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The ICC's Jurisdiction Over the Nationals of Non-Party States: A Critique of the U.S. Position

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THE ICC'S JURISDICTION OVER THE NATIONALS OF NON-PARTY STATES: A CRITIQUE OF THE U.S. POSITION

MICHAEL P. SCHARF*

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I

INTRODUCTION

On August 20, 1998, the United States launched an airstrike against the Al Shiffa pharmaceutical plant in Sudan, which U.S. officials claimed was a chemical weapons facility operated by Osama bin Laden, the terrorist behind the bombings of the U.S. embassies in Tanzania and Kenya a month earlier.¹ It was subsequently disclosed that the Al Shiffa plant in fact produced legitimate pharmaceutical products including anti-malaria drugs under a United Nations contract specifically approved by the United States and that Osama bin Laden actually had no financial or other connection to the plant.² Arguing that the bombing of a civilian pharmaceutical plant constituted a war crime, the President of Sudan called for the international prosecution of the U.S. officials behind the airstrike.³

This type of scenario is exactly that which prompted the United States to join China, Libya, Iraq, Israel, Qatar, and Yemen as the only seven countries in the world voting in opposition to the Rome Treaty for an International Criminal Court ("ICC").⁴ As a Congressional Research Services Report for Congress concluded, "[a]t the core of the U.S. objection to the ICC Treaty is the fear that other nations would use the ICC as a political forum to challenge actions deemed legitimate by responsible governments."⁵ Had the ICC been in existence in August 1998, Sudan could have initiated proceedings potentially leading to an international indictment and arrest warrant for the United States personnel responsible for the airstrike on the Al Shiffa plant (possibly including the

1. See Coordinator for Counterterrorism, U.S. Department of State, *Fact Sheet: U.S. Strike on Facilities in Afghanistan and Sudan*, United States Information Agency, Aug. 21, 1998 (visited Oct. 2, 2000) <<http://usinfo.state.gov/topical/pol/terror/98082112.htm>>; Letter Dated Aug. 20, 1998 from the Permanent Representative of the United States of America to the United Nations Addressed to the President of the Security Council, U.N. Doc. S/1998/760, Aug. 20, 1998 (visited Oct. 2, 2000) <<http://usinfo.state.gov/topical/pol/terror/98082008.htm>>.

2. See generally Michael Barletta, *Report: Chemical Weapons in the Sudan*, 6 NONPROLIFERATION REV. 115-37 (1998); Colum Lynch, *Allied Doubts Grow About US Strike on Sudanese Plant*, BOSTON GLOBE, Sept. 24, 1998, at A2 (noting that many U.S. allies expressed doubts over the accuracy of U.S. intelligence).

3. See Barletta, *supra* note 2, at 118; Lynch, *supra* note 2, at A2.

4. Rome Statute of the International Criminal Court, U.N. Doc. A/CONF.183.9, July 17, 1998 [hereinafter *Rome Treaty*], reprinted in M. CHERIF BASSIOUNI, *THE STATUTE OF THE INTERNATIONAL CRIMINAL COURT* 39 (1998). One hundred and twenty countries voted in favor of the treaty, 7 opposed, and 21 abstained. The vote was registered by a non-recorded electronic vote as requested by the U.S. delegation; therefore, there is no official record of the way any particular state voted. Bartram S. Brown, *U.S. Objections to the Statute of the International Criminal Court: A Brief Response*, 31 N.Y.U. J. INT'L L. & POL'Y 855, 855 n.2 (1999). Based on interviews with the participating delegations, however, Anthony Lewis of the New York Times disclosed that the United States, Israel, China, Libya, Iraq, Qatar, and Yemen were the delegations that voted against the Rome Statute. See Anthony Lewis, *At Home Abroad*, N.Y. TIMES, July 20, 1998, at A15. Israel has since announced that it has changed its position and is likely to sign the Rome Treaty by the end of 2000. See Nomi Bar-Yaacov, *In Change of Heart, Israel Considers Signing War Crimes Treaty*, Agence France Press, Aug. 20, 1999, available in Lexis, Curnws File.

5. Congressional Research Service/The Library of Congress, *The International Criminal Court Treaty: Description, Policy Issues, and Congressional Concerns*, Jan. 6, 1999, at 9.

President, Secretary of Defense, and military commanders involved).⁶ As a non-party to the Treaty of Rome, the U.S. would not be obligated to provide evidence or surrender accused persons within its territory to the ICC in such a proceeding. However, under Article 12 of the Rome Treaty, the refusal of the United States to become a party would not bar the ICC from issuing an indictment charging American citizens with war crimes or crimes against humanity committed in the territory of Sudan in response to Sudan's complaint.⁷ Such an indictment by an international judicial body could obviously do serious damage to American foreign policy, even if there was no prospect that the accused would ever actually face trial.⁸

Since there is little likelihood of preventing the Rome Treaty from coming into force,⁹ the Clinton Administration has instead attempted to negate this problem by arguing that international law prohibits the ICC from exercising jurisdiction over the nationals of non-parties. Thus, the U.S. Ambassador-at-Large for War Crimes Issues, David Scheffer, testified before the Senate Foreign Relations Committee that "the treaty purports to establish an arrangement whereby U.S. armed forces operating overseas could be conceivably prosecuted by the international court even if the United States has not agreed to be bound by the treaty. . . . [T]his is contrary to the most fundamental principles of treaty law."¹⁰ Subsequently, Ambassador Scheffer stated that this constituted the "single most fundamental flaw in the Rome Treaty that makes it impossible for the United States to sign the present text."¹¹

6. The actual likelihood of an indictment issuing in such a case, however, is remote since it constituted an isolated incident rather than a "plan or policy or a part of a large-scale commission of such crimes" as required by Article 8(1) of the Rome Treaty.

7. Under the so-called "effects" doctrine, Sudan's territorial-based jurisdiction would extend to those (such as the President of the United States, the Secretary of Defense, and the Chairman of the Joint Chiefs of Staff) whose actions in Washington had a direct intended effect in the territory of Sudan. See *S.S. Lotus* (Fr. v. Turk.), 1927 P.C.I.J., (Ser. A), No. 10 (noting that many countries will find jurisdiction for criminal acts done in another state if their effects are felt within its borders); *United States v. ALCOA*, 148 F.2d 416, 443 (2d Cir. 1945) (noting that "any state may impose liabilities, even upon persons not within its allegiance, for conduct outside its borders that has consequences within its borders, which the state reprehends").

8. U.S. Ambassador For War Crimes Issues David Scheffer has written that the consequence imposed by Article 12, particularly for non-parties to the treaty, will be to limit severely those lawful, but highly controversial and inherently risky, interventions that the advocates of human rights and world peace so desperately seek from the United States and other military powers. There will be significant new legal and political risks in such interventions, which up to this point have been mostly shielded from politically motivated charges.

David J. Scheffer, *The United States and the International Criminal Court*, 93 AM. J. INT'L L. 12, 19 (1999).

9. As of December 2000, 118 countries had signed the Rome Treaty, indicating their intention to ratify it, and 24 countries had ratified it. Sixty ratifications are necessary to bring it into force. *Rome ICC Treaty Conference: Rome Statute Signature and Ratification Chart*, <<http://www.igc.org/icc>>.

10. *Hearing Before the Subcomm. on International Operations of the Sen. Comm. on Foreign Relations of the United States Senate*, July 23, 1998, 105th Cong., 2d Sess., S. Rep. No. 105 724, at 13 (statement of David Scheffer).

11. David Scheffer, *International Criminal Court: The Challenge of Jurisdiction*, address at the Annual Meeting of the American Society of International Law 2 (Mar. 26, 1999) (on file with author) [hereinafter Scheffer Address]. Cassette tapes of this speech are available from the American Society of International

A few months later, in a speech before the annual meeting of the American Society of International Law,¹² Ambassador Scheffer, drawing upon and citing a preliminary draft of an article by Professor Madeline Morris of Duke Law School,¹³ laid out several legal arguments in support of his contention. Initially, Ambassador Scheffer argued that the ICC cannot exercise jurisdiction over U.S. nationals on the basis of the universality principle for three reasons: first, because the Rome Statute rejects that basis of jurisdiction by specifying that the consent of the state of the perpetrator's nationality or the state in whose territory the offense took place is a required pre-condition;¹⁴ second, because some of the crimes within the subject matter jurisdiction of the ICC are not recognized as crimes of universal jurisdiction under customary international law;¹⁵ and third, because universal jurisdiction cannot be delegated to a treaty-based collective international court.¹⁶ Next, Ambassador Scheffer argued that the ICC cannot exercise jurisdiction on the basis of the territoriality principle because a state cannot delegate its territorial jurisdiction to try an offender to a treaty-based international court without the consent of the state of nationality.¹⁷ Based on these arguments, Ambassador Scheffer expressed the "hope that on reflection governments that have signed, or are planning to sign, the Rome Treaty will begin to recognize the proper limits to Article 12 and how its misuse would do great damage to international law and be very disruptive to the international political system."¹⁸

The repercussions of Ambassador Scheffer's legal argument are already manifesting themselves on Capitol Hill. On June 29, 1999, Representative Bob Ney (R-Ohio) introduced a bill entitled "Protection of United States Troops From Foreign Prosecution Act of 1999," which *inter alia* would prohibit economic assistance for countries that ratify the ICC Statute. Drawing upon Ambassador Scheffer's argument, the preamble of the bill, which sets forth its rationale, declares "the treaty known as the Rome Statute of the International Criminal Court . . . by claiming the unprecedented [power] over . . . citizens of nations that are not party to the treaty—based upon events taking place in the territory of a nation party to the treaty, is entirely unsupported in international law."¹⁹

This article analyzes the validity of the U.S. argument against the ICC's jurisdiction over the nationals of non-party states in the context of historic precedent and the principles underlying international criminal jurisdiction, and

Law. A slightly revised version of the speech appears in AMERICAN SOCIETY OF INTERNATIONAL LAW: PROCEEDINGS OF THE 93D ANNUAL MEETING 68-72 (2000).

12. *See id.*

13. Madeline Morris, *Exercise of ICC Jurisdiction over Nationals of Non-Party States* (Mar. 1999 draft) (on file with author). The final version of Morris's article, now titled *High Crimes and Misconceptions: The ICC and Non-Party States*, appears in this volume at page 13.

14. *See* Scheffer Address, *supra* note 11, at 3.

15. *See id.*

16. *See id.* at 3-4.

17. *See id.* at 4.

18. *See id.* at 4-5.

19. H.R. 2381, 106th Cong. (1999). Similar language was contained in S.2726, 106th Cong. (2000), introduced by Senator Jesse Helms (R-NC) on June 14, 2000.

demonstrates that it is not the jurisdiction of the ICC over the nationals of non-party states, but the U.S. government's legal argument, which rests on shaky foundations. The article also highlights the potential unintended repercussions of the current U.S. legal position. This analysis could have a substantial bearing on the approach the United States takes to the Rome Statute, for it indicates that the United States actually preserves very little by remaining outside the ICC treaty regime, while the arguments the United States has marshalled against the ICC have the potential of undermining important U.S. law enforcement interests. If this is the case, the best way to protect the United States from the specter of indictment of U.S. personnel by a potentially politicized tribunal²⁰ is not to assume the role of hostile outsider, but rather to sign the Rome Treaty, to play an influential role in the selection of the Court's judges and prosecutor, and then provide U.S. personnel to work in the Office of the Prosecutor, as the United States has so successfully done with respect to the Yugoslavia War Crimes Tribunal.²¹

II

THE NATURE OF INTERNATIONAL JURISDICTION

The term "jurisdiction" refers to the legitimate assertion of authority to affect legal interests. Jurisdiction may describe the authority to make law applicable to certain persons, territories, or situations (prescriptive jurisdiction); the authority to subject certain persons, territories, or situations to judicial processes (adjudicatory jurisdiction); or the authority to compel compliance and to redress noncompliance (enforcement jurisdiction).²² The controversy concerning Article 12 of the Rome Statute involves the ICC's application of adjudicatory jurisdiction to nationals of non-party states,²³ which Ambassador Scheffer and Professor Morris assert is

20. U.S. military officials were not worried during the Kosovo intervention in the spring of 1999 that the International Criminal Tribunal for the Former Yugoslavia could potentially bring charges against U.S. personnel for war crimes. Remarks of Lt. Col. William Lietzau during Q&A, *The United States and the International Criminal Court: Which Way From Here*, Duke University, Durham N.C., Apr. 9, 1999.

21. See Ruth Wedgwood, *Improve the International Criminal Court*, in TOWARD AN INTERNATIONAL CRIMINAL COURT 57 (Council on Foreign Rel., 1999), available at <www.foreignrelations.org/public/pubs> (visited Feb 2, 2000):

The United States has strongly supported the Yugoslav Tribunal with contributions exceeding \$15 million annually, the loan of top-ranking investigators and lawyers from the federal government, the support of NATO ground forces in Bosnia and in Kosovo to permit the safe exhumation of graves, and even the provision of U-2 surveillance photographs to locate the places where the nationalist Serb government has tried to hide the evidence of its wrongdoing.

Even if the United States does not ratify the Rome Treaty, however, the ICC's Assembly of State Parties, which selects the prosecutor and judges, is likely to be dominated not by states with animosity toward the United States, but by America's closest allies, the Western European "like minded states," which have emerged as the staunchest supporters of the ICC.

22. See Kenneth C. Randall, *Universal Jurisdiction Under International Law*, 66 TEX. L. REV. 785, 786 (1988).

23. With respect to the other two types of jurisdiction, the United States does not dispute that the Rome Statute legitimately establishes legislative jurisdiction in the territories of the state parties (and elsewhere where the Security Council has triggered the ICC's jurisdiction), and no one has suggested that

without precedent. This article focuses on the universal and territorial bases underlying the ICC's exercise of adjudicative jurisdiction. But, as an initial matter, it is important to examine the soundness of what appears to be Scheffer's and Morris's operating assumption, namely that novel jurisdictional arrangements are presumptively invalid under international law.²⁴

This assumption runs contrary to a fundamental principle of international law, first articulated by the Permanent International Court of Justice ("PCIJ") in the 1927 case of the *S.S. Lotus*. In one of the most frequently quoted passages of the PCIJ's jurisprudence, the predecessor to the International Court of Justice stated, "Restrictions upon the independence of [s]tates cannot . . . be presumed" and that international law leaves to states "a wide measure of discretion which is only limited in certain cases by prohibitive rules."²⁵

The *Lotus Case* concerned a dispute between France and Turkey about whether Turkey had jurisdiction to try a French sailor for negligence on the high seas. A French vessel had run into a Turkish vessel, causing the death of Turkish citizens. When the French vessel anchored at a Turkish port, Turkey took custody over and prosecuted the French watch officer for criminal manslaughter. France argued that the flag state alone had jurisdiction in such cases and that Turkey could not legitimately try a French citizen under international law since it could not "point to some title of jurisdiction recognized by international law."²⁶ The PCIJ rejected France's argument, ruling that the burden was on France to demonstrate that Turkey's exercise of jurisdiction violated some prohibitive rule of international law.²⁷

the Rome Statute empowers the ICC to compel the nationals of non-parties to comply with its orders to provide evidence or surrender indicted persons. Professor Daniel Bodansky writes that "international law, like U.S. law, places far fewer limits on the exercise of adjudicatory than prescriptive jurisdiction [sic], perhaps because the exercise of adjudicatory jurisdiction over extraterritorial activities is not viewed as infringing to the same degree on the sovereignty or domestic jurisdiction of the state where the activity at issue occurred." Daniel Bodansky, *Human Rights and Universal Jurisdiction*, in *WORLD JUSTICE: U.S. COURTS AND INTERNATIONAL HUMAN RIGHTS* 6 (Mark Gibney ed., 1991).

24. See Scheffer Address, *supra* note 11, at 4 ("As Professor Morris notes, there seem to be no precedents for delegating territorial jurisdiction to another state when the defendant is a national of a third state in the absence of consent by that state of nationality. . . . If it is dubious whether a state may delegate its territorial jurisdiction to another state without consent by the state of nationality, it is even less clear whether territorial jurisdiction may be delegated, without consent, to a collective court. We thus do not believe that the customary international law of territorial jurisdiction permits the delegation of territorial jurisdiction to an international court without the consent of the state of nationality of the defendant."); see also Morris, *High Crimes and Misconceptions*, *supra* note 13, at 27.

It is historically ironic that the United States made an identical argument to justify its opposition to an international war crimes tribunal following World War I. According to American officials at that time, the proposed international tribunal would be illegitimate because it "appeared to be unknown in the practice of nations." *Memorandum of Reservations Presented by the Representatives of the United States to the Report of the Commission on Responsibilities*, Apr. 4, 1919, Annex II, reprinted in 14 AM. J. INT'L L. 127 (1920). The United States reversed its position 30 years later when it advocated the establishment of the Nuremberg tribunal to prosecute Nazi war criminals. See generally TELFORD TAYLOR, *THE ANATOMY OF THE NUREMBERG TRIALS* (1992).

25. *S.S. Lotus* (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No. 10, at 18.

26. *Id.* at 19.

27. See *id.*

In the context of the ICC, application of the *Lotus* principle would mean that sovereign states are free to collectively establish an international jurisdiction applicable to the nationals of non-party states unless it can be shown that this violates a prohibitive rule of international law. So long as states have a legitimate interest in establishing such an arrangement, the question is not whether international law or precedent exists permitting an ICC with this type of jurisdictional reach (as Scheffer and Morris contend), but rather whether any international legal rule exists that would prohibit it.

Professor Morris asserts that this “strong reading of *Lotus*, even if it were good law when *Lotus* was decided (which is itself doubtful), is not an accurate description of the law now.”²⁸ Yet, despite the fact (which Morris highlights in a footnote) that the *Lotus* opinion began its jurisprudential life as a 6-6 decision of the World Court (with the tie broken by the President of the Court), the now-venerable *Lotus* principle continues to be cited with approval by the ICJ as well as the U.S. government. Most recently, the International Court of Justice confirmed the continuing vitality of the *Lotus* principle in its July 8, 1996, Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons.²⁹

Moreover, in a situation quite analogous to that presented by the ICC, the U.S. government cited the *Lotus* principle to justify its prosecution of German war criminals after World War II. In response to the Defense argument in the *Hadamar Trial*³⁰ that no international legal authority existed that would permit an occupying power’s military tribunals to try offenders whose crimes were committed prior to the occupation, the United States argued that “[t]he principle of the *Lotus Case*, applied to the case before this Commission, means that the jurisdiction of the Commission, as a question of international law, need be denied only upon a showing that there is a generally accepted rule of international law which would prohibit the exercise of such jurisdiction.”³¹ Fifty years later, in its brief to the World Court in the *Nuclear Weapons Case*, the United States similarly argued, “It is a fundamental principle of international law that restrictions on [s]tates cannot be presumed but must be found in conventional law specifically accepted by them or in customary law generally accepted by the community of

28. Morris, *High Crimes and Misconceptions*, *supra* note 13, at 47.

29. The ICJ majority opinion concluded: “State practice shows that the illegality of the use of certain weapons as such does not result from an absence of authorization but, on the contrary, is formulated in terms of prohibition”—which the Court found existed in the form of international humanitarian law. *Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons*, 1996 ICJ Rep. ¶ 52. Only the dissenting judges (Weeramantry and Shahabuddeen) argued that the burden of showing “authorization” fell on the nuclear powers. *Id.* at 15 (Shahabuddeen dissenting).

30. 1 *Law Reports of Trials of War Criminals* 46 (1949). The case involved claims that the defendants and their underlings had executed by lethal injection nearly 500 Polish and Russian civilians at a sanatorium in Hadamar, Germany.

31. Charles H. Taylor, *Memorandum, Has the Commission Jurisdiction to Hear and Determine the Hadamar Case?*, U.S. JAGD Document (declassified on June 19, 1979) (on file with author).

nations.”³² Having consistently relied on the principle of the *Lotus Case* for the past fifty years, it would be transparently disingenuous for the United States now to deny the application of the principle to the ICC.

In the context of international criminal law, the contemporary logic of the *Lotus* principle is supported by the nature of state sovereignty and the embryonic status of international law relative to domestic law. The continued growth and evolution of international criminal law requires a permissive legal culture, which encourages state experimentation with new forms of collective international jurisdictional arrangements.

Drawing by analogy upon the law of assignments as it exists in municipal and private international law, Professor Morris makes the novel argument that the delegation of jurisdiction over non-party nationals to the ICC should be considered impermissible because of the potential prejudice to the rights of the obligor state.³³ There are two problems with this argument. First, the law of assignments has never been found to constitute a general principle of law, applicable by analogy on the public international legal plain. The International Court of Justice has taken a cautious approach to the importation of domestic law and private international law concepts into public international law, even as gap fillers. As Judge Badawi Pasha stated in the *Injuries Case*, “[b]ut in international law, recourse to analogy should only be had with reserve and circumspection. Contrary to what is the case in municipal law, and precisely owing to the principle of [s]tate sovereignty, the use of analogy has never been a customary technique in international law.”³⁴ The general principles of law found in domestic systems that have been imported into public international law over the years have involved primarily procedural principles, such as the concepts of laches, res judicata, and the use of circumstantial evidence.³⁵ In contrast, attempts to import substantive principles from domestic law, such as the law of easements and trusts, have been rejected by international judicial bodies.³⁶ The non-assignment principle that Professor Morris propounds would fall within the latter category. Thus, it cannot be deemed a prohibitive rule of international law under the principle of *Lotus*.

The second problem with the analogy to the law of assignments is that in the case of international criminal law the obligor (whose position may be prejudiced by assignment of jurisdiction to the ICC) is the individual offender, not the state of the offender’s nationality. Professor Morris’s argument blurs the important

32. Written Statement of the Government of the United States of America, Before the International Court of Justice, Request by the United Nations General Assembly for an Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons, June 20, 1995, at 8 (on file with author).

33. See Morris, *High Crimes and Misconceptions*, *supra* note 13, at 50-51.

34. *Reparations for Injuries Suffered in the Service of the United Nations*, 1949 I.C.J. 182-211.

35. See OSCAR SCHACHTER, *INTERNATIONAL LAW IN THEORY AND PRACTICE* 50-55 (1991).

36. See *Case Concerning Right of Passage Over Indian Territory (Merits) (Portugal v. India)*, 1960 I.C.J. 6 (rejecting application of the municipal law of easements); *International Status of South West Africa (Advisory Opinion)*, 1950 I.C.J. (rejecting application of the municipal law of trusts to a U.N. trust territory).

distinction between the state and its nationals.³⁷ Even a finding that an individual is guilty of committing a crime in an official capacity in the context of a state policy implies at most an *obiter dictum* as to state responsibility, and it will often fall short of that.³⁸ Furthermore, under contemporary international law, the state of nationality has no right to exercise exclusive jurisdiction over acts committed by its nationals abroad, whether or not they constitute official acts.³⁹ When the territorial state prosecutes such persons, the state of the nationality of the accused may seek to intercede diplomatically on the basis of comity, but it has no legal right under international law to induce the territorial state to refrain from prosecuting or to impel it to agree to resort to interstate dispute resolution.⁴⁰ Thus, even if the law of assignments were applicable, delegation of jurisdiction to the ICC would be compatible with the non-prejudice principle since no *right* of the state of nationality of the accused is prejudiced by assignment of the case to an international criminal court.

37. As the Nuremberg Tribunal concluded fifty years ago, "Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced." *Nazi Conspiracy and Aggression: Opinion and Judgment* 53 (U.S. Gov't Printing Office 1947). The Nuremberg judgment represented a departure from the traditional rules of international law, which were primarily concerned with the conduct of states and their responsibility for violations of international norms. It is not contested that the existence of the ICC infringes the impunity of persons charged with serious international crimes; but there is no "right" to impunity.

38. See Otto Triffterer, *Prosecution of States for Crimes of State*, 67 INT'L REV. PEN. L. 341, 346 (1996). Modern international practice highlights the important distinction between individual criminal responsibility and state responsibility, and the different fora for determining these issues. Thus, military officers and civilian leaders, acting at the behest of the Federal Republic of Yugoslavia, have been indicted by the International Criminal Tribunal for the former Yugoslavia, while the Federal Republic of Yugoslavia is charged with genocide by Bosnia before the International Court of Justice. See FRANCIS A. BOYLE, *THE BOSNIAN PEOPLE CHARGE GENOCIDE: PROCEEDINGS AT THE INTERNATIONAL COURT OF JUSTICE CONCERNING BOSNIA V. SERBIA ON THE PREVENTION AND PUNISHMENT OF THE CRIME OF GENOCIDE* 4-80 (1996) (reproducing Bosnia's application before the ICJ); MICHAEL P. SCHARF, *BALKAN JUSTICE: THE STORY BEHIND THE FIRST INTERNATIONAL WAR CRIMES TRIAL SINCE NUREMBERG* 150-55 (1997) (discussing the indictment of and proceedings against Radovan Karadzic and Ratko Mladic).

39. The suggestion that a state has a right of exclusive jurisdiction over its nationals concerning acts committed abroad reflects a colonialist concept that was prevalent in earlier centuries but has little relevance to modern practice. See Bartram S. Brown, *U.S. Objections to the Statute of the International Criminal Court: A Brief Response*, 31 N.Y.U. J. INT'L L. & POL. 855, 871 (1999). In *Reid v. Covert*, 354 U.S. 1 (1957), the U.S. Supreme Court explained that in the Middle Ages, Western states used treaties to protect their nationals from the jurisdiction of foreign courts. *Id.* at 57. By the 19th century, the principle was applied only to legal systems seen as "inferior" to those of Western Christian countries. *Id.* at 60. With the exception of status of forces agreements, such treaties do not exist in modern times. See Brown, *supra*, at 872.

40. Most commentators and government authorities would be appalled by the notion that questions involving atrocities such as genocide, crimes against humanity, or serious war crimes could be negotiable between a strong and weak state, or indeed between states of equivalent power, or that possible compromises could be reached. See, e.g., Brown, *supra* note 39, at 871. It is worth noting, however, that where the territorial state has initiated a complaint with the ICC, the state of nationality can still bring diplomatic pressure on the complaining state in an attempt to persuade it to rescind its complaint, and thereby terminate the ICC's proceedings against the individual in question.

III

THE UNIVERSALITY PRINCIPLE OF JURISDICTION

Most commentators focus on the territorial basis of the ICC as legitimizing its jurisdiction over the nationals of non-party states under Article 12 of the Rome Treaty. Given the unique nature of the core crimes within the ICC's subject matter jurisdiction, however, the universal basis is also relevant. This is not to imply that the ICC may exercise universal jurisdiction in the sense that it is empowered to prosecute non-party nationals without a referral by the Security Council or the consent of the state in which the crime was committed. The delegates in Rome decided against so broad a jurisdictional reach. But where the territorial state gives its consent (as expressed by ratifying or acceding to the Rome Treaty or by special consent on a case-by-case basis), in addition to the principle of territoriality, the ICC has a legitimate interest on the basis of the universal nature of the crimes to prosecute the nationals of non-party states. In this limited context, the jurisdiction of the ICC can be deemed to be based concurrently on the universal and territorial bases of jurisdiction.

Universal jurisdiction provides every state with jurisdiction over a limited category of offenses generally recognized as of universal concern, regardless of where the offense occurred, the nationality of the perpetrator, or the nationality of the victim.⁴¹ While other bases of jurisdiction require connections between the prosecuting state and the offense, the perpetrator, or the victim, the universality principle assumes that every state has a sufficient interest in exercising jurisdiction to combat egregious offenses that states universally have condemned.⁴² Ambassador Scheffer has said that the foundations for the argument that the universality principle permits the ICC to lawfully exercise jurisdiction over the nationals of non-party states "are paper thin,"⁴³ and Professor Morris argues that the "universal jurisdiction theory . . . faces a number of difficulties."⁴⁴ In responding to Scheffer and Morris's contentions, this section first examines the universal basis of jurisdiction incorporated into the Rome Treaty, and then explores the precedent for the conferral of universal jurisdiction on an international tribunal.

A. The Universal Jurisdictional Basis of the Rome Treaty

Ambassador Scheffer maintains that the drafters of the Rome Statute rejected universal jurisdiction.⁴⁵ In his words, "the requirement of the consent of the state on whose territory the crime was committed would be unnecessary if the [c]ourt's

41. See Randall, *supra* note 22, at 788.

42. See *id.* at 787.

43. Scheffer Address, *supra* note 11, at 3.

44. See Morris, *High Crimes and Misconceptions*, *supra* note 13, at 43.

45. "Article 12 of the Rome Treaty rejects universal jurisdiction for the Court." Scheffer Address, *supra* note 11, at 3.

basis for jurisdiction were universality.⁴⁶ His contention, however, is belied by the negotiating record of the Rome Treaty.

No one at the Rome Diplomatic Conference disputed that the core crimes within the ICC's jurisdiction—genocide, crimes against humanity, and war crimes—were crimes of universal jurisdiction under customary international law (although there were debates about the scope and definitions of those crimes).⁴⁷ Thus, the drafters did not view the consent of the state of territoriality or nationality as necessary as a matter of international law to confer jurisdiction on the court. Rather, they adopted the consent regime as a limit to the exercise of the court's inherent jurisdiction as a politically expedient concession to the sovereignty of states in order to garner broad support for the statute.⁴⁸ As Professor Leila Nadya Sadat has observed, when the prosecutor or a state refers the case, "although the universality principle does not disappear, layered upon it is a State consent regime" requiring that either the territorial state or the state of the accused's nationality be party to the Rome Treaty or accept the jurisdiction of the court on an *ad hoc* basis.⁴⁹

According to Philippe Kirsch, the Chairman of the Rome Diplomatic Conference, three options were considered with respect to the exercise of the ICC's jurisdiction.⁵⁰ The first option was a German proposal providing automatic jurisdiction over the core crimes in the court's statute, which enjoyed strong support.⁵¹ The second option, which also garnered wide support, was a Korean proposal that provided jurisdiction if any of four states were party to the court's statute: the territorial state, the state of nationality of the accused, the state of nationality of the victim, or the state with custody of the accused.⁵² The third option, proposed by the United States, would require the consent of the State of nationality of the offender as a precondition for the exercise of jurisdiction over war crimes and crimes against humanity, but not for genocide.⁵³ This option enjoyed very little support.⁵⁴

46. *Id.*

47. See Philippe Kirsch & John T. Holmes, *The Rome Conference on an International Criminal Court: The Negotiating Process*, 93 AM. J. INT'L L. 2, 12 n.19 (1999). This is reflected in the preamble to the Rome Treaty, which "affirm[s] that the most serious crimes of concern to the international community as a whole must not go unpunished," states that the Rome Conference is "determined to put an end to impunity for the perpetrators of these crimes," and "recall[s] that it is the duty of every state to exercise its criminal jurisdiction over those responsible for international crimes." Rome Treaty, *supra* note 4, at 39 (preamble).

48. See *id.* at 9.

49. Leila Sadat Wexler (now Sadat) & S. Richard Carden, *The New International Criminal Court: An Uneasy Revolution*, 88 Georgetown L.J. 381, 413 (2000); see also Jordan S. Paust, *The Reach of ICC Jurisdiction over Non-Signatory Nationals*, 33 VAND. J. INT'L L. 1, 7 (2000) ("In this case, the ICC will be able to exercise a form of limited universal jurisdiction.").

50. See Kirsch & Holmes, *supra* note 47, at 7; see also COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT 332-38 (Otto Triffterer ed. 1999).

51. See Kirsch & Holmes, *supra* note 47, at 7.

52. See *id.*

53. See *id.*

54. See *id.* at 9.

With time running out, on the last day of the Diplomatic Conference, the Conference Bureau presented what it considered to be a compromise approach that would "attract the broadest possible support for the statute."⁵⁵ This approach, which is codified in the final text of Article 12 of the Rome Treaty, requires as a precondition for the exercise of jurisdiction that either the territorial state or the state of nationality of the accused be parties to the court's statute or give special consent to the ICC's jurisdiction on an ad hoc basis.⁵⁶ Where the prosecutor or territorial state brings a complaint concerning the nationals of a non-party state, Article 18 of the statute accords the non-party state the same procedural rights as party states in terms of challenging the admissibility of the case.⁵⁷

The United States responded by proposing an amendment to Article 12 that would exempt the nationals of a non-party state from the jurisdiction of the ICC in cases arising from the official actions of the non-party state acknowledged as such by the non-party.⁵⁸ The proposed amendment was soundly defeated on a no-action vote.⁵⁹ Thus, while Ambassador Scheffer's argument now is that under no circumstances can the ICC legitimately exercise jurisdiction over the nationals of non-party states, at the Diplomatic Conference the United States did not object to the ICC's exercise of universal jurisdiction over the citizens of non-party states for the crime of genocide. Nor did it object to the ICC's exercise of universal jurisdiction over the private citizens of non-party states,⁶⁰ or the unauthorized acts of military personnel or government officials, for crimes against humanity or war

55. *Id.* at 10.

56. In an unfortunate bit of drafting, Article 12(3) appears to permit the territorial state and state of nationality to consent to the ICC's jurisdiction with respect to "the crime in question" on an ad hoc basis without subjecting themselves to the ICC's jurisdiction over their own citizens' actions within the situation giving rise to the crime. This is contrary to the original thrust of the statute, which, as conceived by the ILC, did not permit states the benefits of the statute without accepting the burden. This provision is likely to be corrected through clarification by the PrepCom. See Wexler & Carden, *supra* note 49, at 413 n.192.

57. See Rome Treaty, *supra* note 4, art. 18(1):

When a situation has been referred to the [c]ourt pursuant to article 13(a) and the [p]rosecution has determined that there would be a reasonable basis to commence an investigation, or the [p]rosecutor initiates an investigation pursuant to articles 13(c) and 15, the [p]rosecutor shall notify all [s]tate parties and those [s]tates which, taking into account the information available, would normally exercise jurisdiction over the crimes concerned.

58. See U.N. Doc. A/CONF.183/C.1/L.90 (1998); see also Theodor Meron, *The Court We Want*, WASH. POST, Oct. 13, 1998, at A15; Scheffer, *supra* note 8, at 19. Ambassador Scheffer has provided the following rationale for the U.S. proposal: The proposal

would require a nonparty state to acknowledge responsibility for an atrocity in order to be exempted, an unlikely occurrence for those who usually commit genocide or other heinous crimes. In contrast, the United States would not hesitate to acknowledge that the humanitarian interventions, peacekeeping actions, or defensive actions to eliminate weapons of mass destruction are "official state actions."

Id. at 20.

59. See Scheffer, *supra* note 8, at 19.

60. According to Ambassador Scheffer, "[w]e would have no objection, for example, if the ICC were to prosecute private U.S. citizens who are mercenaries operating in a foreign country." Discussion with David Scheffer, Washington D.C., Nov. 3, 1999.

crimes. The U.S. Delegation's positions in Rome therefore undercut the absolutist legal argument that Ambassador Scheffer now propounds.⁶¹

B. The Universal Nature of the Crimes Within the Rome Statute

Next, Ambassador Scheffer and Professor Morris assert that "[n]ot all of the crimes within the subject matter jurisdiction of the Court in fact enjoy universal jurisdiction under customary international law."⁶² Thus, Scheffer has stated that

[i]t is implausible for a state party or a consenting non-party state to delegate to a treaty-based international court the right to prosecute a mixture of crimes, some of which in a domestic setting are crimes of universal jurisdiction but other of which, even in a domestic setting, are not crimes of universal jurisdiction.⁶³

Philippe Kirsch, the Chairman of the Rome Diplomatic Conference, has written that "[i]t was understood that the statute was not to create new substantive law, but only to include crimes already prohibited under international law."⁶⁴ This limitation was felt to be necessitated by the international maxim *nullem crimen sine lege*, which requires that the ICC try only existing crimes recognized under international law or the law of the state in whose territory the crime was committed.⁶⁵ This is true, whether the Security Council refers a case to the court (in which case the Rome Statute requires the consent of no state),⁶⁶ or the prosecutor or a state refers the case. Although Article 11 of the Rome Treaty limits the ICC's jurisdiction to crimes committed after its entry into force, the *nullem crimen* principle is still relevant because the ICC can prosecute continuing

61. The U.S. Delegation's representations in Rome might estop the United States from being able to assert its legal argument (broadly objecting to the ICC's jurisdiction over all non-party nationals) before the ICC or some other international judicial forum in the future. Estoppel, based on the general principles of good faith and equity, requires that a state (through its officials) be consistent in its attitude toward a question of law, because the attitude gives rise to reliance and expectations among other states. See Case concerning the Temple of Preah Vihear (Camb. v. Thail.), 1962 I.C.J. 6, 42 (Alfaro, J., separate opinion, June 15); D.W. Bowett, *Estoppel Before International Tribunals and Its Relation to Acquiescence* 33 BRIT. Y.B. INT'L L. 176-202 (1957).

62. Scheffer Address, *supra* note 11, at 3. He points to "various war crimes embodied in the ICC Statute that stem from the Hague regulations or from the laws and customs of war, neither of which directly provides for universal jurisdiction." *Id.*; Morris, *High Crimes and Misconceptions*, *supra* note 13, at 28.

63. Scheffer Address, *supra* note 11, at 3.

64. Kirsch & Holmes, *supra* note 47, at 7 n.19 (citing 1 *Report of the Preparatory Committee on the Establishment of an International Criminal Court*, U.N. GAOR, 51st Sess., Supp. No. 22, at 16, U.N. Doc. A/51/22 (1996)).

65. This maxim, codified in the International Covenant on Civil and Political Rights, as well as the Nuremberg Judgment, provides that "no one shall be held guilty of any criminal offense on account of any act or omission which did not constitute a criminal offense, under national or international law, at the time when it was committed." International Covenant on Civil and Political Rights, Dec. 16, 1966, art. 15, 999 U.N.T.S. 171; Nazi Conspiracy and Aggression: Opinion and Judgment 49 (U.S. Gov't Printing Office 1947).

66. According to the Report of the Secretary-General on the proposed Statute of the Yugoslavia War Crimes Tribunal, "the application of the principle *nullem crimen sine lege* requires that the international tribunal should apply rules of international humanitarian law which are beyond any doubt part of customary law so that the problem of adherence of some but not all [s]tates to specific conventions does not arise." *Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808* (1993), U.N. Doc. S/25704, ¶ 34 (1993), reprinted in 2 VIRGINIA MORRIS & MICHAEL P. SCHARF, AN INSIDER'S GUIDE TO THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA 9 (1995).

crimes such as disappearances or forced removal of children from an ethnic group, which were commenced prior to its entry into force. Thus the drafters intended to limit the ICC's subject matter jurisdiction to prior existing international crimes.

The four categories of crimes within the Rome Statute were considered *jus cogens* norms⁶⁷ by most states and commentators, "even though their precise definition had not been completely agreed by all [s]tates."⁶⁸ That is, even without complete accord on the exact definitional content of each offense, the delegations to the Rome Diplomatic Conference generally seemed confident as to the propriety of defining their scope for purposes of the ICC's jurisdiction.⁶⁹ This was really no different than what the international community had done in 1945 when it enumerated the first definition of crimes against humanity in the Nuremberg Charter,⁷⁰ or in 1958, when it established the first codified definition of piracy in the Law of the Sea Convention⁷¹—both of which were subsequently viewed as codifications of customary law. Thus, Professor Sadat writes, "It is [certainly] possible to view the drafters in Rome merely as scribes writing down already existing customary international law, rather than as legislators prescribing laws for the international community."⁷²

The remainder of this section provides an analysis of whether the specific offenses enumerated in the Rome Statute are in fact subject to universal jurisdiction under international law. To establish a framework for such an examination, it is useful to begin by exploring the general attributes of universal jurisdiction crimes and the history of the development of such crimes. There are two alternative premises underlying universal jurisdiction.⁷³ The first involves the gravity of the crime. Many of the crimes subject to the universality principle are so heinous in scope and degree that they offend the interest of all humanity, and any state may, as humanity's agent, punish the offender. The second involves the *locus delicti* (place of the act). Many of the crimes subject to the universality principle occur in territory over which no country has jurisdiction or in situations in which

67. The term *jus cogens* refers to a limited number of peremptory norms having the character of supreme law which cannot be modified by treaty or by ordinary customary law. *Jus cogens* norms also give rise to obligations *erga omnes*, which are obligations owing to the international community as a whole. As the International Court of Justice explained in the *Barcelona Traction* case,

an essential distinction should be drawn between the obligations of a [s]tate towards the international community as a whole, and those arising vis-à-vis another [s]tate in the field of diplomatic protection. By their very nature the former are the concern of all [s]tates. In the view of the importance of the rights involved, all [s]tates can be held to have a legal interest in their protection; they are obligations *erga omnes*. Such obligations derive, for example, in contemporary international law, from the outlawing of acts of aggression, and of genocide, as also from the principles and rules concerning the basic rights of the human person.

Barcelona Traction, Light and power Co. (Belg. v. Spain), 1970 I.C.J. 3, 32 (Feb. 5).

68. Wexler & Carden, *supra* note 49, at 406-07.

69. *See id.* at 407.

70. *See infra* note 124 and accompanying text.

71. *See infra* notes 75-80 and accompanying text.

72. Wexler & Carden, *supra* note 49, at 390 n.35.

73. *See* Lee A. Steven, *Genocide and the Duty to Extradite or Prosecute: Why the United States is in Breach of its International Obligations*, 39 VA. J. INT'L L. 425, 435 (1999).

the territorial state is unlikely to exercise jurisdiction, because, for example, the perpetrators are state authorities or agents of the state.⁷⁴

The first widely accepted crime of universal jurisdiction was piracy. For more than three centuries, states have exercised jurisdiction over piratical acts on the high seas, even when neither the pirates nor their victims were nationals of the prosecuting state.⁷⁵ Piracy's fundamental nature and consequences explained why it was subject to universal jurisdiction. Piracy often consists of heinous acts of violence or depredation, which are committed indiscriminately against the vessels and nationals of numerous states.⁷⁶ Moreover, pirates can quickly flee across the seas, making pursuit by the authorities of particular victim states difficult.⁷⁷ In 1820, the U.S. Supreme Court upheld the exercise of universal jurisdiction by U.S. courts over piracy in *United States v. Smith*.⁷⁸ The Court reasoned that "pirates being *hostis humani generis* [enemies of all humankind], are punishable in the tribunals of all nations. All nations are engaged in a league against them for the mutual defence and safety of all."⁷⁹

Although piracy and its land counterpart, brigandage, are the oldest of the crimes of universal jurisdiction recognized under customary international law, until recently there was no authoritative definition of piracy. "It was not settled, for example, whether *animus furandi*, an intent to rob, was a necessary element, whether acts by insurgents seeking to overthrow their government should be exempt, as were acts by state vessels and by recognized belligerents, and whether the act had to be by one ship against another or could be on the same ship."⁸⁰ The historic debate over the definition of the crime of piracy indicates that disagreement over the scope or contours of a universal crime does not deprive the offense of its universal character.

74. See Wexler & Carden, *supra* note 49, at 407 n.156.

75. Like other international criminals, pirates can retain their nationality and still be subject to universal jurisdiction. See Randall, *supra* note 22, at 794.

76. See Bodansky, *supra* note 23, at 9; Hari M. Osofsky, *Domesticating International Criminal Law: Bringing Human Rights Violators to Justice*, 107 YALE L. J. 191, 194 (1997); Randall, *supra* note 22, at 794.

77. See Bodansky, *supra* note 23, at 9; Osofsky, *supra* note 76, at 194 n.18; Randall, *supra* note 22, at 795.

78. 18 U.S. (5 Wheat.) 153 (1820). The Piracy Statute of 1819 provided "if any person or persons whatsoever, shall, on the high seas, commit the crime of piracy, as defined by the law of nations, and . . . shall afterwards be brought into or found in the United States, every such offender . . . shall, upon conviction . . . be punished with death." The Supreme Court upheld this statute over the objection that it failed to define the crime with sufficient particularity. See *id.* at 162.

79. *United States v. Smith*, 18 U.S. (5 Wheat.) 153, 156 (1820). Accord *U.S. v. Klintock*, 18 U.S. (5 Wheat) 144 (1820), in which the Supreme Court stated:

A pirate, being *hostis humani generis*, is of no nation or [s]tate. . . . All the [s]tates of the world are engaged in a tacit alliance against them. An offense committed by them against any individual nation, is an offense against all. It is punishable in the [c]ourts of all. So, in the present case, the offense committed on board a piratical vessel, by a pirate, against a subject of Denmark, is an offense against the United States, which the [c]ourts of this country are authorized and bound to punish.

Id. at 147-48.

80. Malvina Halberstam, *Terrorism on the High Seas: The Achille Lauro, Piracy and the IMO Convention on Maritime Safety*, 82 AMER. J. INT'L L. 269, 272 (1988).

In the aftermath of the atrocities of the Second World War, the international community extended universal jurisdiction to war crimes and crimes against humanity. Trials exercising this jurisdiction took place in international tribunals at Nuremberg and Tokyo,⁸¹ as well as domestic courts. Some individuals faced trial in the states in which they had committed their crimes, but others were tried by whatever state in which they were later captured, surrendered, or found—including such far-off countries as Canada⁸² and Australia.⁸³ Thus, on the basis of universal jurisdiction, Israel tried Adolph Eichmann in 1961⁸⁴ and John Demjanjuk in 1988⁸⁵ for crimes committed before Israel even existed as a state.

In extending universal jurisdiction to war crimes and crimes against humanity, an analogy was made between those offenses and piracy. Like piracy, the Nazi and Japanese offenses during the war involved violent and predatory action, and were typically committed in locations where they would not be prevented or punished through other bases of jurisdiction.⁸⁶ As Colonel Willard Cowles wrote on the eve of the establishment of the Nuremberg Tribunal:

81. See *infra* notes 212-233 and accompanying text.

82. See *R. v. Imre Finta*, [1994] 28 C.R. (4th) 265 (S.C.) (Canada) (reaffirming universal jurisdiction over crimes against humanity committed against Jews in Hungary during Second World War, but finding that the available evidence did not meet the requisite standard for such crimes).

83. See *Polyukhovich v. Commonwealth*, 172 C.L.R. 501 (Austl. 1991) (Australia) (reaffirming universal jurisdiction over crimes against humanity and war crimes committed against Jews in the Ukraine during Second World War).

84. Israel kidnapped Adolph Eichmann in Argentina and prosecuted him in Jerusalem in 1961 for crimes against humanity and war crimes. As chief of the Gestapo's Jewish Section, Eichmann had primary responsibility over the persecution, deportation, and extermination of hundreds of thousands of Jews. Although the Security Council condemned Israel for violating Argentina's territorial sovereignty in apprehending Eichmann, there was no averment that Israel lacked jurisdiction to try him. In upholding the District Court's conviction and death sentence, the Supreme Court of Israel stated:

There is full justification for applying here the principle of universal jurisdiction since the international character of crimes against humanity . . . dealt with in this case is no longer in doubt. . . . The basic reason for which international law recognizes the right of each [s]tate to exercise such jurisdiction in piracy offenses . . . applies with even greater force to the above-mentioned crimes. Not only do all the crimes attributed to the appellant bear an international character, but their harmful and murderous effects were so embracing and widespread as to shake the international community to its very foundations. The State of Israel therefore was entitled, pursuant to the principle of universal jurisdiction and in the capacity of a guardian of international law and an agent for its enforcement, to try the appellant. That being the case, no importance attaches to the fact that the State of Israel did not exist when the offenses were committed.

Attorney General of Israel v. Eichmann, 36 I.L.R. 277, 299, 304 (Isr. Sup. Ct. 1962).

85. The United States granted Israel's request for the extradition of John Demjanjuk, a retired auto worker accused of being the infamous Treblinka Nazi death camp guard "Ivan the Terrible." See *Demjanjuk v. Petrovsky*, 776 F. 2d 571 (6th Cir. 1985). The Court held that Israel had the right to try Demjanjuk under universal jurisdiction for crimes committed in Poland during 1942 or 1943, prior to the establishment of the Israeli State. See *id.* at 582-83. Demjanjuk was found guilty and sentenced to death for crimes against humanity by the Israeli court, but his conviction was subsequently overturned when new evidence discovered after the collapse of the Soviet Union was considered by the Israeli Supreme Court. See *Cr. A. 347/88, Demjanjuk v. State of Israel* 395-96 (Special Issue); Mordechai Kremnitzer, *The Demjanjuk Case*, in *WAR CRIMES IN INTERNATIONAL LAW* 321, 323 (Yoram Dinstein & Mala Tabory eds., 1996).

86. See Randall, *supra* note 22, at 793.

Basically, war crimes are very similar to piratical acts, except that they take place usually on land rather than at sea. In both situations there is, broadly speaking, a lack of any adequate judicial system operating on the spot where the crime takes place—in the case of piracy it is because the acts are on the high seas and in the case of war crimes because of a chaotic condition or irresponsible leadership in time of war. As regards both piratical acts and war crimes there is often no well-organized police or judicial system at the place where the acts are committed, and both the pirate and the war criminal take advantage of this fact, hoping thereby to commit their crimes with impunity.⁸⁷

On December 11, 1946, the United Nations General Assembly unanimously affirmed the “principles of international law recognized by the Charter of the Nuremberg Tribunal and the Judgment of the Tribunal,”⁸⁸ thereby “codifying the jurisdictional right of all [s]tates to prosecute the offenses addressed by the IMT [Nuremberg Tribunal],”⁸⁹ namely war crimes, crimes against humanity, and the crime of aggression.⁹⁰ The General Assembly has subsequently confirmed that no statute of limitations or amnesty may be applied to bar prosecution of such crimes and that all states have a duty to cooperate in their prosecution.⁹¹

Crimes under international law can be established by custom, by treaty, or both.⁹² Crimes subject to universal jurisdiction include piracy, genocide, war crimes, crimes against humanity, torture, and certain acts of terrorism.⁹³ In recent

87. Willard B. Cowles, *Universality of Jurisdiction Over War Crimes*, 33 CAL. L. REV. 177, 194 (1945).

88. G.A. Res. 95, U.N. Doc. A/64/Add.1, at 188 (1946).

89. Randall, *supra* note 22, at 834.

90. See Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis and the Charter of the International Military Tribunal annexed thereto, 8 Aug. 1945, art. 6, 82 U.N.T.S. 279, reprinted in 2 VIRGINIA MORRIS & MICHAEL P. SCHARF, *THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA* 473 (1998) [hereinafter *RWANDA TRIBUNAL*].

91. See, e.g., Declaration on Territorial Asylum, G.A. Res. 2312, 22 U.N. GAOR Supp. No. 16, at 81, U.N. Doc. A/6716 (1967) (“states shall not grant asylum to any person with respect to whom there are serious reasons for considering that he has committed a war crime or crime against humanity”); United Nations Resolution on War Criminals, G.A. Res. 2712, 25 U.N. GAOR Supp. No. 28, at 78-79, U.N. Doc. A/8028 (1970), reprinted in M. CHERIF BASSIOUNI, *CRIMES AGAINST HUMANITY IN INTERNATIONAL CRIMINAL LAW* 698 (1992) (adopted by a vote of 55 in favor to 4 against with 33 abstentions) (condemning war crimes and crimes against humanity and “call[ing] upon the [s]tates concerned to bring to trial persons guilty of such crimes”); G.A. Res. 2840, 26 U.N. GAOR Supp. No. 29, at 88, U.N. Doc. A/8429 (1971) (adopted by a vote of 71 in favor to none against with 42 abstentions) (affirming that a state’s refusal “to cooperate in the arrest, extradition, trial and punishment” of persons accused or convicted of war crimes or crimes against humanity is “contrary to the United Nations Charter and to generally recognized norms of international law”); United Nations Resolution on Principles of International Cooperation in the Detection, Arrest, Extradition, and Punishment of Persons Guilty of War Crimes and Crimes Against Humanity, G.A. Res. 3074, GAOR Supp. No. 30, at 79, U.N. Doc. A/9030 (1973), reprinted in BASSIOUNI, *supra*, at 701 (adopted by a vote of 94 in favor to none against with 29 abstentions) (War crimes and crimes against humanity “shall be subject to investigation and the persons against whom there is evidence that they have committed such crimes shall be subject to tracing, arrest, trials and, if found guilty, to punishment.”).

92. See Lee A. Steven, *Genocide and the Duty to Extradite or Prosecute: Why the United States is in Breach of its International Obligations*, 39 VA. J. INT’L L. 425, 436 (1999). Cf. M. CHERIF BASSIOUNI & EDWARD M. WISE, *AUT DEDERE AUT JUDICARE: THE DUTY TO EXTRADITE OR PROSECUTE IN INTERNATIONAL LAW* 20, 43-44 (1995).

93. Professor Kenneth Randall notes a high level of international consensus with respect to universal jurisdiction over piracy, slave trade, war crimes, hijacking, hostage taking, crimes against internationally protected persons, apartheid, torture and genocide. He indicates that debate continues over prolonged arbitrary detention and disappearance. See Randall, *supra* note 22, at 834-38. The Restatement (Third)

years, domestic courts in Spain and the United Kingdom have determined that universal jurisdiction exists to prosecute the former President of Chile for acts of torture committed in Chile in the 1980s,⁹⁴ courts of Denmark and Germany have relied on the universality principle in trying Croatian and Bosnian Serb nationals for war crimes and crimes against humanity committed in Bosnia in 1992,⁹⁵ and courts in Belgium have cited the universality principle as a basis for issuing arrest warrants against persons involved in the atrocities in Rwanda in 1994.⁹⁶

In 1993, the U.N. Security Council established an ad hoc international criminal tribunal with jurisdiction over war crimes, genocide, and crimes against humanity committed in the Former Yugoslavia.⁹⁷ The Tribunal's jurisdiction was conservatively formulated to cover only those crimes that were "beyond any doubt" recognized under customary international law.⁹⁸ In *Prosecutor v. Tadic*, the Tribunal's Appeals Chamber applied a four-pronged test to determine the existence of an international crime: (1) the infringement of a rule of international humanitarian law; (2) the customary or treaty law character of the crime; (3) the seriousness of the violation of humanitarian law; and (4) the establishment of individual criminal responsibility by the rule in question.⁹⁹ Finding that the crimes within the ICTY's Statute (genocide, crimes against humanity, grave breaches of the Geneva Conventions, and war crimes in *both* international and internal armed

recognizes a nearly identical set of violations over which universal jurisdiction is appropriate: "piracy, slave trade, attacks on or hijacking of aircraft, genocide, war crimes, and perhaps certain acts of terrorism." RESTATEMENT (THIRD) FOREIGN RELATIONS LAW OF THE UNITED STATES § 702 (1987).

94. In the Pinochet Case, the U.K. House of Lords found the former President of Chile extraditable to Spain for prosecution under the universality principle enshrined in the Torture Convention. *Regina v. Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte*, [1999] 2 W.L.R. 272 (H.L.), 38 I.L.M. 430 (1999).

95. In the 1994 case of *Director of Public Prosecutions v. T*, the defendant was tried by a Denmark court for war crimes committed against Bosnians in the territory of the former Yugoslavia. See Mary Ellen O'Connell, *New International Legal Process*, 93 AM. J. INT'L L. 334, 341 (1999).

On April 30, 1999, the German Federal Supreme Court upheld the conviction of a Bosnian Serb convicted for committing acts of genocide in Bosnia. See 5 INTERNATIONAL LAW UPDATE 52 (May 1999). A press release on this case—Number 39/1999—is available on the German Federal Supreme Court's website: <www.unikarlsruhe.de/-bgh>.

The U.S. Second Circuit Court of Appeals similarly relied on universal jurisdiction in a tort case arising under the Alien Tort Claims Act and the Torture Victim Protection Act against Radovan Karadzic, the Bosnian Serb leader accused of crimes against humanity and war crimes in Bosnia. See *Kadic v. Karadzic*, 70 F.3d 232, 240 (2d Cir. 1995).

96. See Theodor Meron, *International Criminalization of Internal Atrocities*, 89 AM. J. INT'L L. 554, 577 (1995) (While several of the warrants involved the killing of Belgian peacekeepers, one of the warrants was issued against a Rwandan responsible for massacres of other Rwandans in Rwanda.).

97. See Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, *annexed to Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808* (1993), U.N. Doc. S/25704, Annex (1993), reprinted in 2 MORRIS & SCHARF, AN INSIDER'S GUIDE, *supra* note 66, at 3.

98. *Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808* (1993), U.N. Doc. S/25704, ¶ 34 (1993), reprinted in 2 MORRIS & SCHARF, AN INSIDER'S GUIDE, *supra* note 66, at 9.

99. *Prosecutor v. Tadic*, Appeal on Jurisdiction, No. IT-94-1-AR72, ¶ 94 (Oct. 2, 1995), 35 I.L.M. 32 (1996).

conflict) met these tests, the Appeals Chamber concluded that they are amenable to universal jurisdiction.¹⁰⁰

Under the Rome Statute, the ICC would have jurisdiction over the same core crimes that are within the jurisdiction of the Yugoslavia tribunal: genocide, crimes against humanity, and war crimes (although the scope of some of these are defined in slightly different terms).¹⁰¹ In addition to confining the ICC's jurisdiction to core offenses that have been authoritatively recognized as crimes of universal jurisdiction, the drafters stipulated that the court is only to exercise its jurisdiction in cases involving "the most serious crimes of concern to the international community as a whole."¹⁰² This gravity requirement means that the crimes within the ICC's jurisdiction will be interpreted narrowly, in the light of the first premise underlying universal jurisdiction.

While Article 5 of the Rome Statute also lists aggression as one of the crimes potentially within the court's jurisdiction, it leaves the crime undefined, and specifies that the court may not exercise jurisdiction over this crime until the Assembly of States Parties (by a two-thirds majority vote) adopts a definition of aggression in accordance with Articles 121 and 123 of the statute. Under the process prescribed in those articles, the earliest aggression could be added to the jurisdiction of the ICC would be seven years after the statute enters into force.¹⁰³ If the crime is added, it is almost certain to follow the formula proposed by the International Law Commission and favored by the United States, namely that a charge of aggression may not be brought unless the Security Council has first determined that the state concerned "has committed the act of aggression which is the subject of the charge."¹⁰⁴

100. See Geoffrey R. Watson, *The Humanitarian Law of the Yugoslavia War Crimes Tribunal: Jurisdiction in Prosecutor v. Tadic*, 36 VA. J. INT'L L. 687, 707-08 (1996); *Prosecutor v. Tadic*, Appeal on Jurisdiction, No. IT-94-1-AR72, ¶ 62 (Oct. 2, 1995), 35 I.L.M. 32 (1996) ("Furthermore, one cannot but rejoice at the thought that, universal jurisdiction being nowadays acknowledged in the case of international crimes, a person suspected of such offences may finally be brought before an international judicial body for a dispassionate consideration of his indictment by impartial, independent and disinterested judges coming, as it happens here, from all continents of the world."). In its *amicus curiae* brief presented to the ICTY in the *Tadic* case, the U.S. government stated:

The relevant law and precedents for—genocide, war crimes, and crimes against humanity—clearly contemplate international as well as national actions against those responsible. Proscription of these crimes has long since acquired the status of customary international law, binding on all [s]tates, and such crimes have already been the subject of international prosecutions by the Nuremberg and Tokyo Tribunals.

See COMMENTARY ON THE ROME STATUTE, *supra* note 50, at 334 n.36.

101. See Rome Treaty, *supra* note 4, arts. 5-8, reprinted in BASSIOUNI, *supra* note 4, at 39.

102. *Id.* art. 1; see also *id.* Preamble ¶ 5.

103. See *id.* arts 5(2), 121, 123. Even if the crime of aggression is added to the court's jurisdiction through the prescribed process, the court may not exercise jurisdiction over the crime if it is committed by a national of or on the territory of a state that did not accept the amendment. See *id.* art. 121(5).

104. James Crawford, *Current Developments: The ILC's Draft Statute for an International Criminal Court*, 88 AMER. J. INT'L L. 140, 147 (1994) (the author was the Chairman of the ILC Working Group on the Permanent ICC).

1. *Genocide*. Genocide, which has been described as “the ultimate crime and the gravest violation of human rights it is possible to commit,”¹⁰⁵ is now universally recognized as a crime under international law over which a state may exercise universal jurisdiction. The concept of genocide is derivative of the crimes against humanity of the persecution type recognized in the Charter of the Nuremberg Tribunal.¹⁰⁶ In 1946, the United Nations General Assembly adopted a resolution declaring genocide to be an international crime.¹⁰⁷

Two years later, the General Assembly adopted the Genocide Convention, which as of 1999 has 127 parties.¹⁰⁸ Article VI of the Genocide Convention requires prosecution by the state in whose territory genocide occurs or in an international court established for this purpose.¹⁰⁹ While some might argue that Article VI demonstrates that genocide is not a universal jurisdiction crime, the article has been interpreted as merely establishing the minimum jurisdictional obligation for states in which genocide occurs. Therefore, other states are free under customary international law to expand upon this baseline—something that the United States itself has done by legislating both nationality as well as territorial jurisdiction in the Genocide Convention Implementation Act of 1987.¹¹⁰

105. *United Nations, Economic and Social Council, Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities; Revised and Updated Report on the Question of the Prevention and Punishment of the Crime of Genocide Prepared by Mr. B. Whitaker*, at 5, U.N. Doc. E/CN.4/Sup.2/1985/6 (1995).

106. Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis and the Charter of the International Military Tribunal annexed thereto, Aug. 8, 1945, art. 6(c), 82 U.N.T.S. 279, reprinted in 2 MORRIS & SCHARF, *RWANDA TRIBUNAL*, *supra* note 90, at 473.

107. G.A. Res. 96(I), U.N. Doc. A/64/Add.1, at 188 (1946). In the Justice Case, before the American tribunal under the authority of Control Council Law No. 10, the tribunal noted the significance of General Assembly Resolution 96(I):

The General Assembly is not an international legislature but it is the most authoritative organ in existence for the interpretation of world opinion. Its recognition of genocide as an international crime [in Resolution 96(I)] is persuasive evidence of the fact. We approve and adopt its conclusions. . . . We find no injustice to persons tried for such crimes [genocide]. They are chargeable with knowledge that such acts were wrong and were punishable when committed.

United States v. Altstoetter, 3 Trials of War Criminals (1946-1949), at 983 (U.S. Mil. Trib.—Nuremberg 1948).

108. Convention on the Prevention and Punishment of the Crime of Genocide, in *United Nations, Multilateral Treaties Deposited with the Secretary-General*, Status as of Aug. 5, 1999 (ST/LEG/SER.E) (visited Aug. 8, 1999) <http://www.un.org/Depts/Treaty/final/ts2/newfiles/part_booviv_booviv_1.html>.

109. Convention on the Prevention and Punishment of the Crime of Genocide, 9 Dec 1948, art. VI, 78 U.N.T.S. 277. A joint U.S., French, and Belgian amendment was responsible for the reference to an international criminal court in Article VI of the Genocide Convention. See Matthew Lippman, *The 1948 Convention on the Prevention and Punishment of the Crime of Genocide: Forty-Five Years Later*, 8 TEMP. INT'L & COMP. L.J. 1, 61 (1994) (citing the Convention's negotiating record).

110. See 18 U.S.C. § 1091(d) (1994); see also *Attorney General of Israel v. Eichmann*, 36 I.L.R. 18, 39 (Jerusalem Dist. Ct. 1961), *aff'd*, 36 I.L.R. 277 (Isr. S. Ct. 1962) (“The reference in Article 6 to territorial jurisdiction, apart from the jurisdiction of the non-existent international tribunal, is not exhaustive. Every sovereign [s]tate may exercise its existing powers within the limits of customary international law, and accession of a [s]tate to the [c]onvention does not involve the waiving of powers which are not mentioned in Article 6.”).

Of the crimes defined in the Rome Statute, genocide is the least controversial, for it precisely tracks the definition of genocide contained in article II of the Genocide Convention.¹¹¹ Indeed, genocide was the one crime for which the United States Delegation at Rome was willing to accept universal jurisdiction.¹¹² The International Court of Justice,¹¹³ the U.N. Commissions of Experts on the Rwanda Situation,¹¹⁴ and a number of U.S. courts¹¹⁵ have all determined that the crime of genocide has achieved the status of *jus cogens* and binds all members of the international community.

111. Compare Convention on the Prevention and Punishment of Genocide, art. II, approved Dec. 9, 1948, 78 U.N.T.S. 277, 280, with Rome Treaty, *supra* note 4, art. 6, reprinted in BASSIOUNI, *supra* note 4, at 39.

112. See Scheffer, *supra* note 8, at 19 (“We were prepared to accept the automatic jurisdiction of the ICC over genocide.”).

The International Law Commission Working Group on the ICC, pointed out that the case for automatic jurisdiction is

powerfully reinforced by the Genocide Convention itself, which does not confer jurisdiction over genocide on other [s]tates on an *aut dedere aut judicare* basis, but expressly contemplates its conferral on an international criminal court to be created (art. VI). The Draft Statute [for the ICC] can thus be seen as completing in this respect the scheme for the prevention and punishment of genocide begun in 1948—and at a time when effective measures against those who commit genocide are called for.

Report of the International Law Commission on the Work of its Forty-Sixth Session, U.N. GAOR, 49th Sess., Supp. No. 10, at 67-68, U.N. Doc. A/49/10 (1994).

113. Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, 1951 I.C.J. 15, 23 (May 28) (“The principles underlying the [Genocide] Convention are principles which are recognized by civilized nations as binding on [s]tates, even without any conventional obligation.”); Case Concerning Barcelona Traction, Light and Power Co. (Belgium v. Spain), 1970 I.C.J. 3, 32 (Feb. 5) (noting that the prohibition of genocide is *jus cogens*); Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia v. Yugoslavia), 1993 I.C.J. 325, 440 (Sept. 13) (separate opinion of J. ad hoc Lauterpacht) (“The prohibition of genocide . . . has generally been accepted as having the status not of an ordinary rule of international law but of *jus cogens*. Indeed, the prohibition of genocide has long been regarded as one of the few undoubted examples of *jus cogens*.”).

114. In 1994, the United Nations Committee of Experts reporting on the situation in Rwanda noted that the crime of genocide had achieved the status of *jus cogens* and binds all members of the international community. *Letter dated 9 December 1994 From the Secretary General Addressed to the President of the Security Council*, U.N. Doc. S/1994/1405 (Annex) (1994), reprinted in 2 MORRIS & SCHARF, RWANDA TRIBUNAL, *supra* note 90, at 150.

115. See *United States v. Matta-Ballesteros*, 71 F.3d 754, 764 n.5 (9th Cir. 1996) (acknowledging that the prohibition of genocide is a *jus cogens* norm); *Princz v. Federal Republic of Germany*, 26 F.3d 1166, 1180 (D.C. Cir. 1994) (Wald, J., dissenting) (“One need not pause long before concluding that the international community’s denunciation of both genocide and slavery are accepted norms of customary international law and, in particular, are *jus cogens* norms.”); *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699, 715 (9th Cir. 1992) (“The universal and fundamental rights of human beings identified by Nuremberg—rights against genocide, enslavement, and other inhumane acts—are the direct ancestors of the universal and fundamental norms recognized as *jus cogens*.”); *Demjanjuk v. Petrovsky*, 776 F.2d 571, 582 (6th Cir. 1985) (“International law recognizes a ‘universal jurisdiction’ over certain offenses,” including genocide); *Hirsh v. State of Israel*, 962 F. Supp. 377, 381 (S.D.N.Y. 1997) (“A foreign state violates *jus cogens* when it participates in such blatant violations of fundamental human rights as genocide, slavery, murder, torture, prolonged arbitrary detention, and racial discrimination.”); *Beanal v. Freeport-McMoRan*, 969 F. Supp. 362, 371 (E.D. La. 1997) (recognizing universal jurisdiction over the crime of genocide).

2. *Crimes Against Humanity.* It is now widely accepted that crimes against humanity are subject to universal jurisdiction.¹¹⁶ In its comments on the establishment of an international criminal court, the United States emphasized that states have a continuing responsibility to prosecute those who commit crimes against humanity.¹¹⁷ But defining such crimes posed somewhat of a challenge for the drafters at Rome since no definitive definition existed, either as a matter of treaty or customary international law.¹¹⁸ Article 7 of the Rome Statute provides that “crimes against humanity means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack”—followed by a list of eleven specified acts and a catch all category for “other inhuman acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.”¹¹⁹

Rather than strictly follow the formula of the Charters of the Nuremberg and Tokyo Tribunals and the Statutes of the Yugoslavia and Rwanda Tribunals, the Rome Statute adopts the approach of Control Council Law No. 10, which does not require any nexus between crimes against humanity and armed conflict. Yet the choice of the wording for this provision was not haphazard. It was consistent with the authoritative report on the development of the laws of war at the conclusion of the Nuremberg and Control Council Law No. 10 trials, in which the U.N. War Crimes Commission concluded that international law may now sanction individuals for crimes against humanity committed not only during war but also during peacetime.¹²⁰ This was confirmed in the decision of the Appeals Chamber of the Yugoslavia tribunal in the *Tadic* case, which pointed out that it was “settled” that “crimes against humanity do not require a connection to international armed conflict. Indeed... customary international law may not require a connection between crimes against humanity and any conflict at all.”¹²¹ It is important to note that it was the United States that took the lead in Rome in

116. See BASSIOUNI, *CRIMES AGAINST HUMANITY*, supra note 91, at 510-27; 1 OPPENHEIM'S *INTERNATIONAL LAW* 998 (Robert Jennings & Arthur Watts eds., 9th ed. 1992); Richard R. Baxter, *The Municipal and International Law Basis of jurisdiction over War Crimes*, 28 BRIT. Y.B. INT'L L. 382, 391 (1951); Yoram Dinstein, *International Criminal Law*, 20 ISR. L. REV. 206, 211-12 (1985); Meron, supra note 96, at 568; Diane F. Orentlicher, *Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime*, 100 YALE L. J. 2537, 2555, 2593-94 & n.91 (1991).

117. See U.N. Doc. A/AC.244/1/Add.2, ¶ 23 (1995).

118. “Indeed of the several versions that have been ‘promulgated,’ no two are alike. The Tokyo Charter and Control Council Law No. 10 differed slightly from the Nuremberg version; the ICTY provision on crimes against humanity differs from all of its predecessors; and the ICTR version is different than the ICTY version.” Wexler & Carden, supra note 49, at 427.

119. Rome Treaty, supra note 4, art. 7, reprinted in BASSIOUNI, supra note 4, at 39.

120. See HISTORY OF THE UNITED NATIONS WAR CRIMES COMMISSION AND THE DEVELOPMENT OF THE LAWS OF WAR COMPILED BY THE UNITED NATIONS WAR CRIMES COMMISSION (1948), reproduced in BASSIOUNI, *CRIMES AGAINST HUMANITY*, supra note 91, at 570.

121. Prosecutor v. Dusko Tadic, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Case No. IT-94-1-AR72, Oct. 2, 1995, ¶ 141.

arguing that “contemporary international law makes it clear that no war nexus for crimes against humanity is required.”¹²²

Additionally, the Rome Statute expands upon the list of offenses considered crimes against humanity that are enumerated in the statutes of the International Criminal Tribunals for the Former Yugoslavia and Rwanda by adding two new listed offenses: *apartheid*, and enforced disappearance of persons; by expanding the offense of deportation to include “or forcible transfer of population”; by expanding the offense of imprisonment to include “or other severe deprivation of physical liberty in violation of fundamental rules of international law”; and by expanding the offense of rape to include “sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity.”¹²³ It is of significance that the articles on crimes against humanity in the Nuremberg charter and in the statutes of the Yugoslavia and Rwanda tribunals each contain a non-exhaustive list followed by the phrase “and other inhuman acts.”¹²⁴ The additional offenses in the ICC statute clearly fall within that category.¹²⁵

Beginning in the late 1940s, thousands of black South Africans were persecuted and mistreated under that country’s apartheid system.¹²⁶ The addition of the crime of apartheid reflects the codification and condemnation of that crime during the 1960s and ‘70s. The 1969 Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, specifically lists apartheid within the list of crimes against humanity.¹²⁷ A year later, the U.N. General Assembly declared apartheid to be a crime against humanity.¹²⁸ In 1973, the General Assembly adopted the Convention on the Suppression and Punishment of the Crime of Apartheid, which declares apartheid to be a crime against humanity and requires prosecution of persons responsible for this crime.¹²⁹

122. Scheffer, *supra* note 8, at 14.

123. Rome Treaty, *supra* note 4, art. 7, reprinted in BASSIOUNI, *supra* note 4, at 41-42.

124. Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis and the Charter of the International Military Tribunal annexed thereto, Aug. 8, 1945, art. 6(c), 82 U.N.T.S. 279; Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, art 5(i), annexed to Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993), U.N. Doc. S/25704, Annex (1993); Statute of the International Tribunal for Rwanda, art. 3(i), annexed to S.C. Res. 955, U.N. SCOR, 49th Sess., at 20, U.N. Doc. S/INF/50 (1996).

125. See Darryl Robinson, *Defining “Crimes Against Humanity” at the Rome Conference*, 93 AM. J. INT’L L. 43, 55 (1999) (the author was a member of the Canadian delegation to the Rome Diplomatic Conference).

126. See MARTHA MINOW, *BETWEEN VENGEANCE AND FORGIVENESS* 52 (1998).

127. The 1969 Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, 754 U.N.T.S. 73, reprinted in 8 I.L.M. 68 (1969) (Article 1(b) defines crimes against humanity as including “apartheid.”).

128. See United Nations Resolution on War Criminals, G.A. Res. 2712, 25 U.N. GAOR Supp. (No. 28) at 78-79, U.N. Doc. A/8028 (1970), reprinted in BASSIOUNI, *CRIMES AGAINST HUMANITY*, *supra* note 91, at 698.

129. Convention on the Suppression and Punishment of the Crime of Apartheid, Nov. 30, 1973, U.N. GAOR Supp. (No. 30), at 75, U.N. Doc. A/9030 (1973), reprinted in 13 I.L.M. 50 (1974) (entered into force July 18, 1976).

The Convention's definition of apartheid incorporates the special elements of crimes against humanity, namely systematicity and racial motive, and the specific acts within the definition of apartheid are those already associated with the customary definition of crimes against humanity: murder, serious bodily harm, imprisonment, and forced labor.¹³⁰ Thus, in light of the end of the apartheid regime in South Africa in 1994, and the well-publicized proceedings of the Truth and Reconciliation Commission,¹³¹ the addition of the offense of apartheid to the ICC's jurisdiction was noncontroversial.

During the 1970s, military regimes in Chile and Argentina forcibly "disappeared" as many as 30,000 civilians.¹³² The United Nations responded in 1992 by adopting the Declaration on the Protection of All Persons From Enforced Disappearances, which equated disappearances to a crime against humanity and required states to try any person suspected of having perpetrated an act of enforced disappearance.¹³³ This was followed in 1994 by the Organization of American State's adoption of the Inter-American Convention on Forced Disappearance of Persons.¹³⁴ In light of these developments, there was no dissent at Rome for inclusion of the offense of enforced disappearances in the Rome Statute's list of crimes against humanity.

The addition of forcible transfer of population, severe deprivation of physical liberty, and the several sexual offenses reflects the jurisprudence of the International Criminal Tribunals for the Former Yugoslavia and Rwanda.¹³⁵ In fact, as Ambassador Scheffer himself acknowledges, the addition of the several enumerated sexual offenses was due largely to the efforts of the United States.¹³⁶

130. See STEVEN R. RATNER & JASON S. ABRAMS, ACCOUNTABILITY FOR HUMAN RIGHTS ATROCITIES IN INTERNATIONAL LAW: BEYOND THE NUREMBERG LEGACY 115 (1997) (concluding that "apartheid seems to qualify as per se a crime against humanity").

131. The text of the South African Truth Commission's Report is available on the Internet at <www.truth.org.za>.

132. See IAIN GUEST, BEHIND THE DISAPPEARANCES: ARGENTINA'S DIRTY WAR AGAINST HUMAN RIGHTS AND THE UNITED NATIONS (1990). "This practice entails the abduction of citizens by police or armed forces, followed by a failure by the authorities to acknowledge the fact of the seizure or the location of the victim and, in most cases, violence against the victim, such as murder, torture, or rape." RATNER & ABRAMS, *supra* note 130, at 116.

133. *Declaration on the Protection of All Persons From Enforced Disappearances*, G.A. Res. 47/133 (1992) (equating disappearances to a crime against humanity and requiring states to try any person suspected of having perpetrated an act of enforced disappearance).

134. See OEA/ser.P, AG/doc. 3 114/94 rev.1, June 9, 1994.

135. See JOHN R.W.D. JONES, THE PRACTICE OF THE INTERNATIONAL CRIMINAL TRIBUNALS FOR THE FORMER YUGOSLAVIA AND RWANDA 341-55 (1998) (summarizing indictments of the ICTY and the ICTR).

136. See Scheffer, *supra* note 8, at 16-17:

The U.S. delegation, aided by the advice of experts in the NGO community, fought hard during the final sessions of the Preparatory Committee and again in Rome to include explicit reference to crimes relating to sexual assault in the text of the statute. In the end, rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, and any other form of sexual violence of significant magnitude were included as crimes against humanity and war crimes.

3. *War Crimes.* Since Nuremberg, it has been uniformly recognized that war crimes are crimes of universal jurisdiction under customary international law.¹³⁷ However, like crimes against humanity, there has been debate about the specific types of offenses that should qualify as a war crime for this purpose. The war crimes enumerated in Article 8 of the Rome Statute are derived from the 1949 Geneva Conventions,¹³⁸ the two Additional Protocols of 1977 to the Geneva Conventions,¹³⁹ and the Hague Regulations of 1907.¹⁴⁰ In this regard, the scope of the ICC's jurisdiction over war crimes has been challenged on three grounds: first, that only grave breaches of the Geneva Conventions of 1949 entail individual criminal responsibility under customary international law, and consequently, that violations of the Hague Regulations of 1907 and the non-grave breach provisions of the Geneva Conventions cannot provide the basis for universal jurisdiction; second, that Additional Protocol I of 1977 does not constitute customary international law; and third, that war crimes in internal armed conflict, including violations of Additional Protocol II and Common Article 3 of the Geneva Conventions are not yet universally recognized as part of customary international law.

With respect to the first of these arguments, Ambassador Scheffer points to "various war crimes (embodied in the ICC statute) that stem from the Hague regulations or from the laws and customs of war, neither of which directly provides for universal jurisdiction," as an example of the ICC's supposed overbreadth.¹⁴¹ This same argument was raised and rejected by the Nuremberg tribunal fifty years

137. As the post-World War II United Nations War Crimes Commission concluded, "a violation of the laws of war constitutes both an international and a national crime, and is therefore justiciable both in a national and international court." UNITED NATIONS WAR CRIMES COMMISSION, HISTORY OF THE UNITED NATIONS WAR CRIMES COMMISSION AND THE DEVELOPMENT OF THE LAWS OF WAR 232 (1948).

The U.S. Supreme Court has repeatedly recognized the "power of the military to exercise jurisdiction over . . . enemy belligerents, prisoners of war, or others charged with violating the laws of war." *Duncan v. Hahanomoku*, 327 U.S. 304, 312 (1945).

The Pentagon stated in a memo distributed to more than 100 foreign military attaches in Washington, D.C. that "every nation has the responsibility to prevent and punish war crimes . . . [States] have the right and duty to investigate and, if appropriate, prosecute [such] crimes." Pentagon Memorandum of Mar. 27, 1998, reproduced in *CRS Report for Congress, International Criminal Court Treaty: Description, Policy Issues, and Congressional Concerns* app. C, Jan. 6, 1999.

138. Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31; Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135; and Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287.

139. Protocol I Additional to the Geneva Conventions of Aug. 12, 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 609 (1977), reprinted in 16 I.L.M. 1391 (1977); Protocol II Additional to the Geneva Conventions of Aug. 12, 1949, and Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 609 (1977), reprinted in 16 I.L.M. 1442.

140. CARNEGIE ENDOWMENT FOR INTERNATIONAL PEACE, THE HAGUE CONVENTION AND DECLARATIONS OF 1899 AND 1907, at 100 (1915).

141. Scheffer Address, *supra* note 11, at 3.

ago, and it is surprising that Ambassador Scheffer resurrects it in light of the Nuremberg precedent. The Nuremberg charter's definition of war crimes was based on the 1907 Hague regulations as well as the 1929 Geneva Convention Relative to the Treatment of Prisoners of War, neither of which expressly provided for universal jurisdiction.¹⁴² The Nuremberg tribunal found these treaties "declaratory of the laws and customs of war" and held, based on longstanding state practice, that they constituted crimes for which individuals may be prosecuted and punished as "offenses against the laws of war."¹⁴³

It has also been argued that universal jurisdiction is limited to grave breaches of the Geneva Conventions of 1949, and is not available with respect to other violations of those Conventions. The basis for this argument is that the Geneva Conventions create an obligation to prosecute or extradite only with regard to grave breaches. However, as Professor Meron explains, this "does not mean that other breaches of the Geneva Conventions may not be punished by any state party to the Conventions."¹⁴⁴ Rather, as numerous law of war experts have pointed out, the distinction between "grave breaches" and other violations of the Geneva Conventions is that there is a universal obligation to prosecute those accused of grave breaches and a universal right to prosecute those who have committed other violations.¹⁴⁵

It is of significance that in 1997 the U.S. Congress enacted the Expanded War Crimes Act, which made punishable war crimes, whether committed within or outside the United States, if the victim or the perpetrator is an American servicemember or national.¹⁴⁶ The Act specifically defines "war crimes" to include not only grave breaches of the Geneva Conventions, but also other war crimes under the Geneva Conventions, as well as violations of the Hague Regulations.¹⁴⁷ Thus, the United States has already recognized the non-Grave Breach provisions

142. See *Nazi Conspiracy and Aggression: Opinion and Judgment* 83 (U.S. Gov't Printing Office 1947) (Nuremberg Judgment).

143. The Nuremberg Tribunal stated as follows:

The Hague Convention of 1907 prohibited resort to certain methods of waging war. These included the inhumane treatment of prisoners, the employment of poisoned weapons, the improper use of flags of truce, and similar matters. Many of these prohibitions have been enforced long before the date of the Convention, but since 1907 they have certainly been crimes, punishable as offenses against the laws of war; yet the Hague Convention nowhere designates such practices as criminal, nor is any sentence prescribed, nor any mention made of a court to try and punish offenders. For many years past, however, military tribunals have tried and punished individuals guilty of violating the rules of land warfare laid down by this Convention.

Id. at 50.

144. Meron, *supra* note 96, at 569.

145. *Id.*; B.V.A. Roling, *The Law of War and the National Jurisdiction Since 1945*, 100 RECUEIL DES COURS 325, 342 (1960); HOWARD S. LEVIE, *TERRORISM IN WAR: THE LAW OF WAR CRIMES* 192-93 (1993); Waldemar A. Solf & Edward R. Cummings, *A Survey of Penal Sanctions under Protocol I to the Geneva Conventions of August 12, 1949*, 9 CASE W. RES. J. INT'L L. 205, 217 (1977).

146. 18 U.S.C. § 2441.

147. *Id.*

of the Geneva Conventions and the Hague Regulations as an acceptable basis for liability for U.S. personnel.

With respect to the second argument, Professor Morris¹⁴⁸ and a few other scholars have pointed to the fact that the ICC embodies Protocol I to the Geneva Conventions,¹⁴⁹ which the United States has not yet ratified. Thus, writes Professor Ruth Wedgwood, “the universal jurisdiction created by Rome would mean something new, at least for American troops stationed abroad.”¹⁵⁰

In examining the validity of this contention, it is important to first recognize that Additional Protocol I was designed largely to clarify the substantive provisions of the Geneva Conventions of 1949 and to extend the obligation to prosecute to a greater number of the war crimes covered in the Geneva Conventions.¹⁵¹ To the extent that it covers new categories of protected persons and property, a very strong case can be made that Protocol I has ripened into customary international law (as crystallized in the Rome Treaty) and, in any event, the United States already imposes the rules contained in Protocol I on U.S. military personnel operating abroad.

As of the date of writing, 155 States have ratified Protocol I, making it one of the most widely ratified treaties.¹⁵² With the addition of the United Kingdom this year, its parties include seventeen of the nineteen members of NATO and three of the Permanent Members of the Security Council.¹⁵³ The Protocol has been frequently invoked in various conflicts by governments, U.N. investigative bodies, and the International Committee of the Red Cross.¹⁵⁴ Moreover, U.S. soldiers are

148. Professor Morris points to the prohibition of child soldiers embodied in Protocol I as an example of a provision that is not a crime customarily subject to universal jurisdiction. See Morris, *High Crimes and Misconceptions*, *supra* note 13, at 28. In light of recent developments, however, the prohibition may be deemed to have ripened into a universally condemned war crime. Thus, on August 26, 1999, the U.N. Security Council unanimously adopted a resolution condemning the use of children and adolescents in armed conflicts and urging governments to respect conventions prohibiting recruitment and use of child soldiers. See *U.N. Council Condemns Drafting of Children into Armies*, DEUTSCHE PRESSE-AGENTUR, Aug. 26, 1999, available on Lexis, Curnws file. On Jan. 25, 2000, the White House announced that the United States had joined a consensus at a Diplomatic Conference in Geneva on the text of a Protocol that strengthens the prohibition of recruitment and use of soldiers under the age of 18. See *Office of the Press Secretary—Statement by the President*, M2 PRESSWIRE, Jan. 25, 2000, available on Lexis, Curnws File.

149. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 3 (1977). In October 2000, with U.S. support, the U.N. entered into a treaty with Sierra Leone, establishing an ad hoc international criminal tribunal with jurisdiction over serious violations of international humanitarian law including “forced recruitment of children under the age of 15 years into armed forces . . . for the purpose of using them to participate actively in hostilities.” Report of the Secretary General on the Establishment of a Separate Court for Sierra Leone, U.N. Doc. S/2000/915, Oct. 4, 2000, available at <<http://www.un.org/Depts/dhl/docs/s2000915.pdf>>.

150. Ruth Wedgwood, *The International Criminal Court: An American View*, 10 EUR. J. INT’L L. 93, 102 (1999).

151. See COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949, at 977 (T. Sandoz et al. eds., 1987).

152. See THEODOR MERON, WAR CRIMES LAW COMES OF AGE 178-79 (1998).

153. See *id.*

154. See *id.* at 179.

subject to arrest and prosecution/extradition for breaches of the Protocol when they are present in the territory of any State Party.¹⁵⁵

Although the United States has not yet ratified Protocol I, it has signed the Protocol (during the Carter Administration), and therefore it has an international obligation "to refrain from acts which would defeat the object and purpose of the treaty" pending ratification or Senate defeat.¹⁵⁶ The failure of the United States to ratify the Protocol has been largely "because of fears that [it] would legitimize the claims of the Palestine Liberation Organization to prisoner-of-war privileges for its combatants and promote various liberation movements to state or quasi state status."¹⁵⁷ But, taking a position similar to its policy on the 1982 Law of the Sea Convention, the Reagan Administration declared that many of the other provisions of the Protocol (including most, if not all, of the substantive provisions that are referenced in the ICC Statute) represent customary international law.¹⁵⁸ Reflecting this position, the U.S. Air Force and Navy commanders' handbooks employ the Protocol's language.¹⁵⁹ When U.S. Troops are deployed to the U.N. for a peace-keeping mission, they are subject to Protocol I.¹⁶⁰ And, as a matter of policy on the conduct of hostilities during coalition actions (for example, in the Persian Gulf and Balkans), the United States has implemented the rules of the Protocol because of the need to coordinate rules of engagement with its coalition partners and because, as a Defense Department Report on the Persian Gulf Conflict explained, several provisions of Protocol I are "generally regarded as codification of the customary practice of nations, and therefore binding on all."¹⁶¹

155. According to Professor William Schabas, formerly Chairman of the University of Quebec at Montreal Department of Law: "As for the obligation to try U.S. troops in Canada for crimes committed elsewhere, this obligation has existed since we ratified Additional Protocol I. Since we ratified the Protocol, Canada has been required by treaty law to prosecute U.S. troops for grave breaches committed in Canada, or for that matter anywhere in the world." Written Comments Provided by William Schabas via e-mail, Oct. 19, 1999 (on file with author).

156. Vienna Convention on the Law of Treaties, art. 18, May 23, 1969, U.N. Doc. A/Conf. 39/27 at 289 (1969), 1155 U.N.T.S. 331. This Convention entered into force on January 27, 1980, and currently has 75 parties. See MULTILATERAL TREATIES: INDEX AND CURRENT STATUS, ELEVENTH CUMULATIVE SUPPLEMENT 242 (M. J. Bowman & D. J. Harris eds., 1995). The United States is not a party to the Vienna Convention, but the U.S. Department of State has recognized it as the "authoritative guide to current treaty law and practice." S. EXEC. DOC. L., 92D CONG., 1ST SESS., at 1 (1971). Although, in a 1987 letter to the Senate, President Reagan expressed the executive's decision not to submit Protocol I for the Senate's consideration, the Clinton Administration has been conducting a review of the Protocol to determine whether it should be submitted to the Senate for ratification. See MERON, *supra* note 152, at 175-76. Thus, Article 18 of the Vienna Convention is applicable since the United States has not made its intention clear not to become a party to the treaty.

157. MERON, *supra* note 152, at 175.

158. Message from the President of the United States transmitting Protocol II Additional to the Geneva Conventions, *reprinted in* 26 I.L.M. 561 (1987); *see also* MERON, *supra* note 152, at 178.

159. See MERON, *supra* note 152, at 179.

160. On August 30, 1999, U.N. Secretary-General Kofi Annan promulgated an order requiring all forces operating under any U.N. command to abide by the provisions of the Geneva Conventions and Additional Protocols. See <http://www.un.org/peace/st_sgb_1999_13.pdf>.

161. MERON, *supra* note 152, at 179-80, *quoting* U.S. DEPARTMENT OF DEFENSE, CONDUCT OF THE PERSIAN GULF WAR: FINAL REPORT TO CONGRESS, PURSUANT TO TITLE V OF THE PERSIAN GULF

Further evidence of U.S. acceptance of the universality of the substantive provisions of Protocol I can be gleaned from its actions with respect to the Yugoslavia tribunal. In explaining its vote in favor of the Security Council resolution establishing the Statute of the International Criminal Tribunal for the Former Yugoslavia, the United States joined France and the United Kingdom in expressing the view that the provision on “laws and customs of war” should be interpreted as to include other serious violations of international humanitarian law contained in the 1949 Geneva Conventions and Additional Protocol I.¹⁶² The United States later proposed that the tribunal’s Rules of Procedure and Evidence explicitly recognize Additional Protocol I to the 1949 Geneva Conventions as applicable law in the determination of the criminal responsibility of the alleged perpetrators of serious violations of humanitarian law in the former Yugoslavia¹⁶³—which could potentially include U.S. military personnel.¹⁶⁴

Ammunition for the third ground for challenging the ICC’s assertion of universal jurisdiction over war crimes stems from the report of the Secretary General on the Rwanda tribunal. When the Security Council established the Rwanda tribunal, it included within the court’s subject matter jurisdiction violations of Additional Protocol II and Common Article 3, which define war crimes in internal armed conflict. Shortly thereafter, the U.N. Secretary-General wrote,

The Security Council has elected to take a more expansive approach to the choice of the applicable law than the one underlying the statute of the Yugoslavia Tribunal, and included within the subject-matter jurisdiction of the Rwanda Tribunal international instruments regardless of whether they were considered part of customary

CONFLICT SUPPLEMENTAL AUTHORIZATION AND PERSONNEL BENEFITS ACT OF 1991, App. O, at o-13 (1992).

162. See the Statements of the United States, France, and the United Kingdom contained in U.N. Doc. S/PV.3217 at 15, 11, 19, respectively, reproduced in 2 MORRIS & SCHARF, AN INSIDER’S GUIDE, *supra* note 66, at 179.

163. See U.S. Proposal for the Rules of Procedure for the International Criminal Tribunal for the Former Yugoslavia, Rule 2, reproduced in 2 MORRIS & SCHARF, AN INSIDER’S GUIDE, *supra* note 66, at 451.

164. On May 10, 1999, a group of lawyers from several countries filed a formal complaint with the ICTY Prosecutor against 67 named NATO officials and leaders of the NATO countries alleging that they are responsible for war crimes committed in the bombing campaign against Yugoslavia. Bruce Zagaris, *Complaint Before War Crimes Tribunal Charges NATO Leaders with War Crimes*, 15 INT’L ENFORCEMENT L. REP. 249 (Bruce Zagaris ed., 1999).

The charges include wilful killing, wilfully causing great suffering or serious injury to body or health, extensive destruction of property, not justified by military necessity and carried out unlawfully and wantonly, employment of poisonous weapons or other weapons to cause unnecessary suffering, wanton destruction of cities, towns or villages, or devastation not justified by military necessity, attack, or bombardment . . . of undefended towns, villages, dwellings, or buildings, destruction or wilful damage to institutions dedicated to religion, charity, and education, the arts and sciences, historic monuments and works of art and science.

Id. Louise Arbour, the ICTY prosecutor, subsequently announced that she had opened an investigation into these charges. See Michael P. Scharf, CNN Burden of Proof, Transcript #99060100V12, June 1, 1999, available on LEXIS, Curnws Library. On June 8, 2000, the ICTY Office of the Prosecutor published the findings of the investigation, which concluded that charges were not warranted. See Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia, June 8, 2000, at 44 (on file with author).

international law or whether they have customarily entailed the individual criminal responsibility of the perpetrator of the crime.¹⁶⁵

This statement has led some to contend that war crimes in internal armed conflict included in the ICC Statute are not subject to universal jurisdiction under customary international law.¹⁶⁶

In contrast to the situation at the time of the establishment of the Yugoslavia tribunal in 1993, there now exists substantial support for the principle of individual criminal responsibility for violations of international humanitarian law applicable in internal armed conflicts (as contained in Common Article 3 and Additional Protocol II) as a matter of customary international law.¹⁶⁷ The Security Council,¹⁶⁸ General Assembly,¹⁶⁹ and the Commission on Human Rights¹⁷⁰ repeatedly condemned the violations of international humanitarian law committed during the internal armed conflict in Rwanda in 1994 and reaffirmed the individual

165. *Report of the Secretary-General Pursuant to Paragraph 5 of Security Council Resolution 955*, ¶ 12, U.N. Doc. S/1995/134 (1995), reproduced in 2 MORRIS & SCHARF, RWANDA TRIBUNAL, *supra* note 90, at 197.

166. *Cf. Preliminary Remarks By the International Committee of the Red Cross on the Setting-Up of an International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed on the Territory of the Former Yugoslavia* ¶ 4, Mar. 25, 1993, reproduced in 2 MORRIS & SCHARF, AN INSIDER'S GUIDE, *supra* note 66, at 391, 392.

167. The International Court of Justice recognized the customary international law character of the minimum standard of conduct in internal armed conflicts contained in common Article 3 of the 1949 Geneva Conventions in the Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.), 186 I.C.J. 14 (Merits) ¶ 218. It did not, however, address the question of the applicability of the principle of individual responsibility for violations of this standard as a matter of customary international law.

168. *See* Statement by the President, Apr. 30, 1994 (condemning the breaches of international humanitarian law committed in Rwanda, particularly those perpetrated against civilians, and recalling that "persons who instigate or participate in such acts are individually responsible"), U.N. Doc. S/PRST/1994/21 (1994), U.N. SCOR, 49th Sess., at 5, U.N. Doc. S/INF/50 (1996); S.C. Res. 935, U.N. SCOR, 49th Sess., at 11, U.N. Doc. S/INF/50 (1996) (recalling "that all persons who commit or authorize the commission of serious violations of international humanitarian law are individually responsible for those violations and should be brought to justice"); S.C. Res. 955, U.N. SCOR, 49th Sess., at 15, U.N. Doc. S/INF/50 (1996) (indicating its determination to put an end to the genocide and other systematic, widespread, and flagrant violations of international humanitarian law that had been committed in Rwanda and "to take effective measures to bring to justice the persons who are responsible for them").

169. In Resolution 206 of Dec. 23, 1994, the General Assembly condemned "*in the strongest terms* all acts of genocide and violations of international humanitarian law and all violations and abuses of human rights that occurred during the conflict in Rwanda, especially following the tragic events of 6 April 1994." In this resolution, the General Assembly also reaffirmed

that all persons who commit or authorize genocide or other grave violations of international humanitarian law or those who are responsible for grave violations of human rights are individually responsible and accountable for those violations and that the international community will exert every effort to bring those responsible to justice in accordance with international principles of due process.

G.A. Res. 206, U.N. GAOR 49th Sess., Supp. No. 49, vol. I, at 227, U.N. Doc. A/49/49 (1995); *see also* G.A. Res. 200, U.N. GAOR 50th Sess., Supp. No. 49, vol. I, at 266, U.N. Doc. A/50/49 (1996); G.A. Res. 114, U.N. GAOR 51st Sess., Supp. No. 49, U.N. Doc. A/51/49 (1997).

170. *See* Resolution 1995/91 Situation of Human Rights in Rwanda, *Report of the Commission on Human Rights on its Fifty-first Session*, U.N. ESCOR, 1995, Supp. No. 4, at 275, U.N. Doc. E/1995/23 (1995); Resolution 1996/76 Situation of Human Rights in Rwanda, *Report of the Commission on Human Rights on its Fifty-second Session*, U.N. ESCOR, 1996, Supp. No. 3, U.N. Doc. E/1996/23 (1997).

responsibility of persons who commit or authorize such violations. Thus, the international community has affirmed the principle of individual criminal responsibility for violations of international humanitarian law applicable in internal armed conflicts as a matter of customary international law.

Moreover, the Appeals Chamber of the Yugoslavia tribunal recognized the principle of individual criminal responsibility for violations of international humanitarian law applicable in internal armed conflicts as customary international law in the 1995 *Tadic* case.¹⁷¹ Even Professor Theodor Meron, a member of the U.S. Delegation at Rome who had written that “the only offences committed in internal armed conflict for which universal jurisdiction exists are crimes against humanity and genocide,”¹⁷² later altered his position in the light of the appellate rulings of the International Criminal Tribunal for the Former Yugoslavia, which he wrote “have contributed significantly to the development of international humanitarian law and its extension to non-international armed conflicts.”¹⁷³ According to Ambassador Scheffer, “the United States helped lead the effort to ensure that internal armed conflicts were covered by the statute,” which he agreed reflects recent developments in customary international law.¹⁷⁴

To conclude this section, it must be recognized that “international humanitarian law has developed faster since the beginning of the atrocities in the Former Yugoslavia than in the four-and-a-half decades since the Nuremberg Tribunals and the adoption of the Geneva Conventions . . . [of] 1949.”¹⁷⁵ Customary international law on the definition and scope of war crimes and crimes against humanity has been clarified and crystallized by the promulgation of the Statutes of the International Tribunals for the Former Yugoslavia and Rwanda, the decisions rendered by these tribunals, and the acceptance of the international community of these developments. Furthermore, the ICC Statute, in Article 8(b) seeks to limit the interpretation of the court’s jurisdiction over war crimes to those “within the established framework of international law.” Thus, writes Professor

171. Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, IT Doc. IT-94-1-AR72. The Appeals Chamber decided by a four-to-one vote that its subject matter jurisdiction extended to violations of international humanitarian law applicable in internal armed conflicts. In this regard, the Appeals Chamber held that Article 2 of the Yugoslavia Tribunal Statute concerning grave breaches of the 1949 Geneva Conventions applied only in international armed conflicts, but that Article 3 thereof concerning the laws and customs of war applied to war crimes “regardless of whether they are committed in internal or international armed conflicts.” *Id.* at 48, 71. With regard to Protocol II, the Appeals Chamber further stated that “[m]any of the provisions of this Protocol can now be regarded as declaratory of existing rules or as having crystallized emerging rules of customary law or else as having been strongly instrumental in their evolution as general principles.” *Id.* at 63; *see also*, Theodor Meron, *The Continuing Role of Custom in the Formation of International Humanitarian Law*, 90 AM. J. INT’L L. 238 (1996).

172. Meron, *supra* note 96, at 559 n.25.

173. *Id.* at 555.

174. Scheffer, *supra* note 8, at 16. This development will have no effect on the U.S. military since for the past twenty years, U.S. military personnel have been required by regulation to “comply with the law of war in conduct of military operations and related activities in armed conflict, however such conflicts are characterized.” Dep’t of Defense, Directive 5100.77, DOD Law of War Program ¶ E91(a) (July 10, 1979).

175. MERON, *supra* note 152, at 297.

Gerhard Hafner, a member of the Austrian Delegation to the Rome Diplomatic Conference, "a clear limitation to excessive interpretation of this crime is introduced."¹⁷⁶

C. Conferral of Jurisdiction Through a Treaty

Ambassador Scheffer argues that ICC jurisdiction over the nationals of a non-party state would violate the Vienna Convention on the Law of Treaties,¹⁷⁷ which he says "states rather clearly that treaties cannot bind non-party states."¹⁷⁸ However, it is a distortion to say that the Rome Statute purports to impose obligations on non-party states. Under the terms of the Rome Treaty, the parties are obligated to provide funding to the ICC, to extradite indicted persons to the ICC, to provide evidence to the ICC, and to provide other forms of cooperation to the court. Those are the only obligations the Rome Treaty establishes on states, and they apply only to state parties.¹⁷⁹ Thus, Ambassador Scheffer's objection is not really that the Rome Treaty imposes obligations on the United States as a non-party, but that it affects the sovereignty interests of the United States—an altogether different matter that does not come within the Vienna Convention's proscription.¹⁸⁰

Ambassador Scheffer's argument confuses the concepts of obligations of non-party states and the exercise of jurisdiction over the nationals of such states. To untangle the confusion, Philippe Kirsch, the Chairman of the Rome Diplomatic Conference, recently wrote, "This does not bind non-parties to the [s]tatute. It simply confirms the recognized principle that individuals are subject to the substantive and procedural criminal laws applicable in the territories to which they travel, including laws arising from treaty obligations."¹⁸¹ Ambassador Scheffer responded that the assertion that a treaty could provide the basis for jurisdiction with respect to nationals of states that are not party to the treaty contravened "fundamental principles of [t]reaty law."¹⁸²

176. Gerhard Hafner et al., *A Response to the American View as Presented by Ruth Wedgwood*, 10 EUR. J. INT'L L. 108, 121 (1999).

177. Vienna Convention on the Law of Treaties, May 23, 1969, U.N. Doc. A/Conf. 39/27 at 289 (1969), 1155 U.N.T.S. 331. Article 35 of the Convention, which Ambassador Scheffer cites, provides the following: "A treaty does not create either obligations or rights for a third state without its consent."

178. Scheffer Address, *supra* note 11, at 3.

179. In contrast, the ICC Statute does create rights for non-parties, in particular the right to prevent the ICC from exercising jurisdiction if the non-party state in good faith subjects its national to domestic prosecution. While a non-party state may choose to shield its national from prosecution before the ICC in this manner, it is not obligated to do so within the meaning of the Vienna Convention.

180. Although states have a sovereignty interest in their nationals, sovereignty does not provide a basis for exclusive jurisdiction over crimes committed by a state's nationals in a foreign country. See, *supra*, note 39. Nor does a foreign indictment of a state's nationals for acts committed in the foreign country constitute an impermissible intervention in the state's internal affairs.

181. Philippe Kirsch, *The Rome Conference on the International Criminal Court: A Comment*, ASIL NEWSLETTER 1 (Nov./Dec. 1998).

182. David J. Scheffer, *Speech at the Twelfth Annual U.S. Pacific Command International Military Operations and Law Conference*, Honolulu, Hawaii, Feb. 23, 1999, available at <<http://www.state.gov/>

Contrary to Ambassador Scheffer's contention, there is nothing unusual about the conferral of universal jurisdiction over nationals of non-parties through the mechanism of treaty law. The United States is party to numerous international conventions that empower state parties to exercise jurisdiction over perpetrators of any nationality found within their territory irrespective of whether the state of the accused's nationality is also a party to the treaty.¹⁸³ Such treaties include (in chronological order): the 1949 Geneva Conventions,¹⁸⁴ the 1958 Law of the Sea Convention,¹⁸⁵ the 1970 Hijacking Convention,¹⁸⁶ the 1971 Aircraft Sabotage Convention,¹⁸⁷ the 1973 Internationally Protected Persons Convention,¹⁸⁸ the 1979 Hostage Taking Convention,¹⁸⁹ the 1984 Torture Convention,¹⁹⁰ and the 1988

[www/policy_remarks/1999/990223-scheffer-hawaii.html](http://www.policy_remarks/1999/990223-scheffer-hawaii.html)>. But see Morris, *High Crimes and Misconceptions*, *supra* note 13, Part IVC ("The Terrorism Treaties").

183. The U.S. Department of State has taken the position that "universal jurisdiction is achieved whenever a treaty allows a state to prosecute any offender present in its territory and whom it elects not to extradite." *Senate Report: Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, May 23, 1988, S. TREATY DOC. NO. 20, 100TH CONG., 2D SESS. 9 (1988).

184. Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, T.I.A.S. No. 3362, 75 U.N.T.S. 31 (art. 49: duty to search for and prosecute; art. 50: recognition as a crime); Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, T.I.A.S. 3363, 75 U.N.T.S. 85 (art. 50: duty to search for and prosecute; art. 51: recognition as a crime); Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, T.I.A.S. No. 3364, 75 U.N.T.S. 135 (art. 129: duty to search for and prosecute; art. 130: recognition as a crime); Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, T.I.A.S. No. 3365, 75 U.N.T.S. 287 (art. 146: duty to search for and prosecute; art. 147: recognition as a crime).

185. Geneva Convention of the High Seas, Apr. 29, 1958, 13 U.S.T. 2312, T.I.A.S. No. 5200, 450 U.N.T.S. 82 (art. 5: definition of piracy; art. 14: duty to co-operate in the repression of piracy; art. 19: establishment of universal jurisdiction).

186. Convention for the Suppression of Unlawful Seizure of Aircraft, Dec. 16, 1970, 22 U.S.T. 1641, T.I.A.S. No. 7192, 860 U.N.T.S. 105 (art. I: recognition as crime; art. II: duty to punish; art. IV: duty to establish jurisdiction; art. V: duty to apprehend; art. VII: duty to prosecute or extradite; art. X: duty to cooperate in prosecution).

187. Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, Sept. 23, 1971, 24 U.S.T. 564, T.I.A.S. No. 7570, 974 U.N.T.S. 177 (art. 1: recognition as crime; art. 3: duty to punish; art. 5: duty to establish jurisdiction; art. 6: duty to apprehend; arts. 7, 8: duty to prosecute or extradite; art. 11: duty to cooperate in prosecution). The international criminal regime of the Aircraft Sabotage Convention was extended to terrorist acts at airports by the Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, supplementary to the Convention of Sept. 23, 1971, Feb. 24, 1988, S. Treaty Doc. No. 100-19 (1988).

188. Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents, Dec. 14, 1973, 28 U.S.T. 1975, T.I.A.S. 8532 (art. 2: recognition as crime; art. 3: duty to establish jurisdiction; art. 4: duty to prevent; arts. 6, 7: duty to prosecute or extradite; art. 10: duty to provide judicial assistance).

189. International Convention Against the Taking of Hostages, Dec. 18, 1979, U.N. G.A. Res. 34/145 (XXXIV), 34 U.N. GAOR Supp. (No. 46), at 245, U.N. Doc. A/34/146 (art. 1: recognition as crime; art. 2: duty to punish; art. 4: duty to prevent; art. 5: duty to establish jurisdiction; art. 6: duty to apprehend; arts. 7, 8: duty to prosecute or extradite; art. 11: duty to provide judicial assistance).

190. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 7, 1984, U.N. Doc. A/Res/39/46 (art. 1: recognition as international crime; art. 4: duty to criminalize; art. 5: duty to establish jurisdiction; art. 7: duty to extradite; art. 9: duty to provide cooperation and judicial assistance).

Maritime Terrorism Convention.¹⁹¹ Most recently, the United States took the lead in negotiating (and has signed but not yet ratified) the 1994 Convention on the Safety of United Nations Peacekeepers¹⁹² and the 1998 International Convention for the Suppression of Terrorist Bombings.¹⁹³ It is noteworthy that none of these treaties purport to limit their application to offenses committed by the nationals of parties; nor do the United States criminal statutes implementing these treaties limit prosecution to the nationals of the treaty parties.¹⁹⁴

It has been suggested in this regard that a distinction should be drawn between treaties codifying customary international law and treaties legislating new international crimes.¹⁹⁵ The analysis in Part B above established that the core crimes within the Rome Statute are crimes of universal jurisdiction under customary international law. But even if some of these crimes were deemed not to reflect customary international law, there is precedent for state parties to exercise universal jurisdiction created solely by treaty over the nationals of non-party states.

Consider the precedent of the anti-terrorism treaties. Because customary international law did not extend universal jurisdiction over terrorist acts, Professor Jordan Paust made an argument several years ago concerning the Hostage Taking Convention similar to that which Ambassador Scheffer has made with respect to the Rome Treaty. According to Professor Paust, "universal jurisdiction under the Hostages Convention . . . is highly suspect with regard to defendants who are not nationals of a signatory to the Hostages Convention."¹⁹⁶ Professor Malvina Halberstam replied to Paust's contention by pointing out that "since terrorist acts

191. Convention and Protocol on the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, adopted by the International Maritime Organization, at Rome, Mar. 10, 1988, I.M.O. Doc. SVA/CON/15 (art. 3: definition of offense; art. 5: duty to punish; art. 6: duty to establish jurisdiction; art. 10: duty to prosecute; art. 11: duty to extradite; art. 12: duty to render mutual legal assistance).

192. The Convention on the Safety of United Nations and Associated Personnel, Dec. 9, 1994, 34 I.L.M. 482 (1995) (entered into force on Jan. 15, 1999) (art. 9: recognition as crime and duty to punish; art. 10: duty to establish jurisdiction; art. 14: duty to prosecute or extradite); *see also* Evan T. Bloom, *Current Development: Protecting Peacekeepers: The Convention on the Safety of United Nations and Associated Personnel*, 89 AM. J. INT'L L. 621 (1995); *TJAGSA Practice Note*, 1999 ARMY LAW. 21, 22 (1999) ("This Convention implements international law by making it a universal jurisdiction crime to attack neutral persons deployed on behalf of the UN.").

193. International Convention for the Suppression of Terrorist Bombings, 37 I.L.M. 249 (1998) (art. 2(1): recognition as crime; art. 4: duty to punish; art. 6: duty to establish jurisdiction; art. 8: duty to prosecute or extradite; art. 12: duty to prosecute in prosecution); *see also* Samuel M. Witten, *Current Developments: The International Convention for the Suppression of Terrorist Bombings*, 92 AM. J. INT'L L. 774 (1998).

194. *See* Randall, *supra* note 22, at 820; *see, e.g.*, 18 U.S.C. § 32 (1994) (destruction of aircraft); *id.* § 37 (violence at international airports); *id.* §§ 112, 878, 1116 (threats and violence against foreign officials); *id.* § 1203 (hostage taking); *id.* § 1653 (piracy); *id.* §§ 2280-81 (violence on or against ships and fixed platforms); 21 U.S.C. § 960 (1994) (drug trafficking); 49 U.S.C. § 46502 (1994) (hijacking); 18 U.S.C.A. § 2340 (West Supp. 1997) (torture).

195. *See* Bodansky, *supra* note 23, at 14 (suggesting that application of Torture Convention to nationals of non-party states is appropriate "because universal jurisdiction over torture is permitted as a matter of customary international law."); Eric S. Kobrick, *The Ex Post Facto Prohibition and the Exercise of Universal Jurisdiction Over International Crimes*, 87 COLUM. L. REV. 1515, 1520 (1987).

196. Jordan Paust, *Extradition and United States Prosecution of the Achille Lauro Hostage-Takers: Navigating the Hazards*, 20 VAND. J. TRANSNAT'L L. 235, 254 (1987).

are often committed by nationals of states that encourage or condone terrorism, limiting the application of anti-terrorist treaties to nationals of state parties would significantly undermine their effectiveness. It would mean that the community of states is essentially helpless to take legal measures against terrorists who are nationals of states that do not ratify the conventions.”¹⁹⁷ Professor Halberstam stressed that the argument was even stronger where the offense occurred in the territory of a state party. Since there is no question that a state can regulate conduct in its territory, making certain conduct criminal and providing for the prosecution of those who engage in it, then “there is no reason why such a state cannot enter into a treaty with other states—just as the state of nationality of the offender can—authorizing those states to apprehend, try and punish the offender.”¹⁹⁸

The question of the application of universal jurisdiction under the anti-terrorism treaties with respect to nationals of non-party states was addressed by the United States Court of Appeals for the D.C. Circuit in the case of *United States v. Yunis*.¹⁹⁹ The United States had indicted, apprehended and prosecuted Fawaz Yunis, a Lebanese national, for hijacking from Beirut airport a Jordanian Airliner whose passengers included two U.S. citizens.²⁰⁰ The United States asserted jurisdiction in the first instance on the basis of the International Convention Against the Taking of Hostages,²⁰¹ a treaty which provides jurisdiction over hostage-takers, despite the fact that Lebanon was not a party to the treaty²⁰² and did not consent to the prosecution of Yunis in the United States.²⁰³ Given the strained state of relations between the United States and Lebanon at the time, the United States did not solicit Lebanon’s views on the propriety of prosecuting Yunis and would almost certainly have continued the prosecution even if Lebanon had lodged an objection. The Court upheld its jurisdiction based on the domestic legislation implementing the Convention, which had conferred upon it universal

197. Malvina Halberstam, *Terrorism on the High Seas: The Achille Lauro, Piracy and the IMO Convention on Maritime Safety*, 82 AMER. J. INT’L L. 269, 272 (1988).

198. *Id.*

199. 924 F.2d 1086 (D.C. Cir. 1991); see also Mason H. Drake, *United States v. Yunis: The D.C. Circuit’s Dubious Approval of U.S. Long-Arm Jurisdiction Over Extraterritorial Crimes*, 87 NW. U. L. REV. 697 (1993); Peter D. Trooboff, *Aircraft Piracy—Federal Jurisdiction—Nonresident Alien on Foreign Soil*, 83 AM. J. INT’L L. 94 (1989).

200. See *Yunis*, 924 F.2d 1086.

201. Dec. 18, 1979, U.N. G.A. Res. 34/145 (XXXIV), 34 U.N. GAOR Supp. (No. 46), at 245, U.N. Doc. A/34/146, reprinted in 18 I.L.M. 1456.

202. See UNITED STATES DEPARTMENT OF STATE, TREATIES IN FORCE 386 (Pub. No. 9453) (1990) (listing parties to the treaty).

203. See *Yunis*, 924 F.2d at 1092. After Yunis was brought to the United States pursuant to the hostage-taking charge, the prosecution obtained a superseding indictment that included the additional crime of hijacking pursuant to the Convention for the Suppression of Unlawful Seizure of Aircraft (to which Lebanon was a party). Since the airliner in question was not registered to the United States and did not take off from or land in the United States, the hijacking charge could be brought only after the accused was “found” in U.S. territory. Convention for the Suppression of Unlawful Seizure of Aircraft, Dec. 16, 1970, 22 U.S.T. 1641, T.I.A.S. No. 7192, 860 U.N.T.S. 105. The hostage-taking Convention, in contrast, permits a state to assert jurisdiction (e.g., issue an indictment and make an arrest) where its nationals were victims of the hostage-taking.

and passive personality jurisdiction over this type of terrorist act.²⁰⁴ As counsel to the State Department's Counter-Terrorism Bureau at the time, I recall that U.S. government officials in the Departments of Justice and State perceived this confirmation that the anti-terrorism conventions could provide the basis for the United States to prosecute the nationals of non-party states as an important precedent in the fight against terrorism.

The *Yunis* precedent was reaffirmed just last year in *United States v. Rezaq*, where the United States apprehended and prosecuted a Palestinian national for hijacking an Egyptian airliner, despite the fact that Palestine (his claimed country of nationality) is not party to the Hague Hijacking Convention.²⁰⁵ The principle has also been applied in a series of recent cases in which the United States has asserted jurisdiction pursuant to the hostage-taking convention over Chinese nationals who smuggled foreign citizens into the United States and held them captive until their relatives living in the United States paid ransom to secure their release.²⁰⁶ In none of these cases did the courts exhibit concern that China was not a party to the Convention that served as the basis for U.S. jurisdiction over the defendants at the time the acts were committed.²⁰⁷

Nor is the precedent confined to the anti-terrorism treaties. A decade before the *Yunis* case, the United States had exercised treaty-based universal jurisdiction over the nationals of non-party states with respect to the crews of so-called "stateless" vessels on the high seas engaged in narcotics trafficking. In the 1983 case of *United States v. Marino-Garcia*,²⁰⁸ the United States Court of Appeals for the Eleventh Circuit held that the 1958 Law of the Sea Convention gave the United States jurisdiction²⁰⁹ to prosecute Honduran and Columbian crew members of two "stateless" vessels, which were boarded by U.S. Coast Guard officials on the high seas and found to contain thousands of pounds of marijuana. The Court was not troubled by the fact that neither Honduras nor Colombia was a party to

204. See *Yunis*, 924 F.2d at 1091.

205. 134 F.3d 1121, 1130 (D.C. Cir. 1998).

206. See *United States v. Wang Kun Lue*, 134 F. 3d 79 (2d Cir. 1997); *United States v. Lin*, 101 F.3d 760 (D.C. Cir. 1996); *United States v. Ni Fa Yi*, 951 F. Supp. 42 (S.D.N.Y. 1997); *United States v. Chen De Yian*, 905 F. Supp. 160 (S.D.N.Y. 1995). Cf. *United States v. Santos-Riviera*, 183 F.3d 367 (5th Cir. 1999). In these cases, the defendants unsuccessfully challenged the court's jurisdiction on equal protection grounds because only non-U.S. nationals in U.S. territory could be convicted of violating the domestic criminal statute implementing the Hostage Taking Convention, which carries with it a higher sentencing range than mere kidnapping.

207. See UNITED STATES DEPARTMENT OF STATE, *supra* note 202, at 386 (listing parties to the treaty).

208. 679 F.2d 1373, 1383, 1386-87 (11th Cir. 1982); see also Patrick Sorek, *Jurisdiction Over Drug Smuggling on the High Seas: It's A Small World After All*, 44 U. PITT. L. REV. 1095 (1983); Carmine R. Zarlenga, *Case Note: United States v. Marino-Garcia*, 52 U. CIN. L. REV. 292 (1983).

209. 21 U.S.C. § 955a (relocated to 46 U.S.C. App. X § 1901) makes it a crime to possess a controlled substance with intent to distribute it on board a vessel subject to the jurisdiction of the United States. Section 955b(d) includes stateless vessels, as defined by Article 6 of the 1958 Convention on the High Seas, as vessels subject to the jurisdiction of the United States. Under this definition, "stateless vessels" include vessels that sail under the flags of two or more states using the flags according to convenience.

the 1958 Law of the Sea Convention nor that customary international law did not authorize prosecution of crew members of a “stateless” vessel.²¹⁰

In light of these precedents, the United States’ position that international law prohibits the ICC from exercising jurisdiction over the nationals of non-party states is not just unfounded, it also has the potential of negatively affecting existing U.S. law enforcement authority with respect to terrorists and narco-traffickers, as well as torturers and war criminals. Had Ambassador Scheffer’s remarks been on the record prior to the *Yunis, Ali Rezaq, Marino-Garcia*, and the Chinese smuggling cases, the defendants in those cases would undoubtedly have cited this “official U.S. position” to support their challenge to the validity of the U.S. assertion of treaty-based jurisdiction over nationals of non-party states.

D. Conferral of State Jurisdiction to an International Court: The Nuremberg Precedent

The section above demonstrated that the United States has recognized the legitimacy of a treaty conferring upon a state the authority to prosecute the nationals of non-party states who are accused of committing an offense under the treaty. The only difference between that precedent and the ICC is that rather than prosecuting in domestic courts the state has delegated its authority to prosecute to an international body. A precedent for the collective delegation through a treaty of a mix of territorial and universal jurisdiction to an international criminal court exists in the form of the post-World War II Nuremberg tribunal.

The Nuremberg tribunal was established through the London Agreement of August 8, 1945, signed by the United States, Great Britain, the Soviet Union, and France, and adhered to by nineteen other Allied Countries.²¹¹ The tribunal was established to try the major German war criminals “whose offenses have no particular geographical location.”²¹² In his seminal article on crimes against humanity and the Nuremberg tribunal, Professor Egon Schwelb listed the following features, which evince that the Nuremberg tribunal was not a mere occupation court applying national law, but rather an international judicial body applying universal jurisdiction over the Axis country war criminals:

- (a) the name given to the court, The International Military Tribunal;
- (b) the reference in the Preamble to the fact that the four Signatories are “acting in the interests of all the United Nations”;
- (c) the provision in Article 5 of the Agreement giving any Government of the United Nations the right to adhere to the Agreement . . . ;
- (d) the provision of Article 6 of the Charter, according to which the jurisdiction of the Tribunal is not restricted to German major war criminals, but, in theory at

210. UNITED STATES DEPARTMENT OF STATE, *supra* note 202, at 345.

211. Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis and the Charter of the International Military Tribunal annexed thereto, Aug. 8, 1945, art. 1, 82 U.N.T.S. 279, reproduced in 2 MORRIS & SCHARF, RWANDA TRIBUNAL, *supra* note 90, at 471.

212. See *id.* art. 1.

least, comprises the right to try and punish the major war criminals of all other European Axis countries; [and]

- (e) the provision of Article 10 of the Charter providing for the binding character, in proceedings before courts of the signatory States, of a declaration by the Tribunal that a group or organization is criminal.²¹³

In addressing the propriety of this arrangement, the Nuremberg tribunal itself stated:

The Signatory Powers created this Tribunal, defined the law it was to administer, and made regulations for the proper conduct of the trial. In doing so, they have done together what any one of them might have done singly; for it is not to be doubted that any nation has the right thus to set up special courts to administer law.

... [I]ndividuals can be punished for violations of international law. Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced.

... [T]he very essence of the Charter is that individuals have international duties which transcend the national obligations of obedience imposed by the individual state.²¹⁴

In construing these passages, it is telling that in their opening statements, both U.S. Prosecutor Robert Jackson²¹⁵ and U.K. Prosecutor Sir Hartley Shawcross²¹⁶ drew an analogy between the trial of war criminals at Nuremberg and the trial of pirates under international law.

While these passages have been subject to varying interpretations, it is of particular significance that the definitive report on the Nuremberg trials submitted by the United Nations Secretary-General in 1949 concluded as follows:

It is possible that the Court meant that the several signatory Powers had jurisdiction over the crimes defined in the Charter because these crimes threatened the security of each of them. The Court may, in other words, have intended to assimilate the said crimes, in regard to jurisdiction, to such offences as the counterfeiting of currency. On the other hand, it is also possible and perhaps more probable, that the Court considered the crimes under the Charter to be, as international crimes, subject to the jurisdiction of every state. The case of piracy would then be the appropriate parallel. This interpretation seems to be supported by the fact that the Court affirmed that the signatory Powers in creating the Tribunal had made use of a right belonging to any nation. But it must be conceded, at the same time, that the phrase "right thus to set up special courts to administer law" is too vague to admit of definite conclusion.²¹⁷

213. Egon Schwelb, *Crimes Against Humanity*, 23 BRITISH Y.B. INT'L L. 178, 208 (1946).

214. 22 TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL 461, 466 (1995) [hereinafter MAJOR WAR CRIMINALS TRIAL].

215. See ROBERT. H. JACKSON, THE NURNBERG CASE 88 (1947, 2d printing 1971) ("The principle of individual responsibility for piracy and brigandage, which have long been recognized as crimes punishable under International Law, is old and well established. That is what illegal warfare is.").

216. See 3 MAJOR WAR CRIMINALS TRIAL, supra note 214, at 106 ("Nor is the principle of individual international responsibility for offenses against the law of nations altogether new. It has been applied not only to pirates. The entire law relating to war crimes, as distinct from the crime of war, is based upon the principle of responsibility.").

217. THE CHARTER AND JUDGMENT OF THE NUREMBERG TRIBUNAL 80, U.N. Doc. A/CN.4/5, U.N. Sales No. 1949V.7 (1949) (memorandum submitted by the Secretary General).

Fifty years later, in its Report to the Security Council, the U.N. Commission of Experts on the Former Yugoslavia stated:

States may choose to combine their jurisdictions under the universality principle and vest this combined jurisdiction in an international tribunal. The Nuremberg International Military Tribunal may be said to have derived its jurisdiction from such a combination of national jurisdiction of the States parties to the London Agreement setting up that Tribunal.²¹⁸

Given the exceptional credentials of the distinguished members of the Commission, its characterization of Nuremberg as a tribunal of delegated universal jurisdiction should be accorded great weight.²¹⁹

Despite these authoritative statements, Ambassador Scheffer and Professor Morris seek to distinguish the World War II War Crimes Tribunals from the ICC by arguing that “the Nuremberg and Tokyo Tribunals actually operated with the consent of the state of nationality of the defendants, even though such consent arose from the defeat of Germany and Japan, respectively.”²²⁰ Yet, in none of the judgments of the World War II international war crimes trials (the Nuremberg tribunal and the subsequent trials conducted under the authority of Control Council Law No. 10), do the judicial opinions cite the consent of Germany as the basis for the tribunals’ jurisdiction. The absence of any reference to Germany’s consent was explained by Professor Henry King, who had served as one of the junior prosecutors at Nuremberg, in the following terms: “It should be noted that the German armies surrendered unconditionally to the Allies on May 8, 1945. There was no sovereign German government which they dealt in the surrender

218. *Interim Report of the Independent Commission of Experts Established Pursuant to Security Council Resolution 780* (1992), ¶ 73, U.N. Doc. S/25274 (1993), reprinted in 2 MORRIS & SCHARF, AN INSIDER’S GUIDE, *supra* note 66, at 311.

219. The U.N. Commission of Experts consisted of five of the world’s foremost international humanitarian law scholars: Frits Kalshoven, Professor of International Humanitarian Law at the University of Leiden; William Fenrick, Director of Law for Operations and Training in the Canadian Department of Defense; Keba M’Baye, former President of the Supreme Court of Senegal and former President of the International Court of Justice; Torkel Opsahl, Professor of Human Rights Law at Oslo University and a former member of the European Commission on Human Rights; and Cherif Bassiouni, Professor of Law at DePaul University in Chicago, who later served as the Chairman of the Drafting Committee of the Rome Diplomatic Conference. See SCHARF, *supra* note 38, at 42.

Other notable experts who have similarly concluded that Nuremberg was a collective exercise of universal jurisdiction include Yoram Dinstein, then-President of Tel Aviv University and currently the Stockton Professor of International Law at the U.S. Naval War College; Professor Henri King of Case Western Reserve Law School, formerly a prosecutor at Nuremberg; and the late Telford Taylor, who had served as U.S. Chief Counsel at Nuremberg. See WAR CRIMES IN INTERNATIONAL LAW, *supra* note 85, at 155 (“The Nuremberg 4-Power Tribunal was the collective exercise of a customary law jurisdiction, which any one of the four [s]tates could have exercised individually as a belligerent holding enemy personnel accused of war crimes.”); TELFORD TAYLOR, NUREMBERG AND VIETNAM: AN AMERICAN TRAGEDY 80 (1970) (“In terms of international law, the most important single feature of the Nuremberg trials was that the tribunals were established by international authority, and exercised a jurisdiction internationally conferred.”); Henry T. King, Jr., *The Limitations of Sovereignty from Nuremberg to Sarajevo*, 20 CAN.-U.S. L.J. 167, 169 (1994) (“The International Military Tribunal was, among other things, concerned with the International laws of war and not the laws of any particular nation.”).

220. Scheffer, *supra* note 8, at 3; see also Morris, *High Crimes and Misconceptions*, *supra* note 13, at 36-37.

arrangements.”²²¹ Writing in 1945, Professor Hans Kelsen pointed out that the occupying Powers never sought to conclude a peace treaty with Germany (which could have included a provision consenting to trial of German war criminals), because at the end of the war no such government existed “since the state of peace has been de facto achieved by Germany’s disappearance as a sovereign state.”²²²

In this way, the legal foundation of the Nuremberg tribunal is to be contrasted with that of the Tokyo tribunal, which was established with the consent of the Japanese government which continued to exist after the war.²²³ Thus, John Pritchard, the foremost expert on the Tokyo tribunal, writes,

The legitimacy of the Tokyo Trial, *unlike its Nuremberg counterpart*, depended not only upon the number and variety of states that took part in the Trial but more crucially upon the express consent of the Japanese state to submit itself to the jurisdiction of such a court, relinquishing or at least sharing a degree or two of sovereignty in the process.²²⁴

While the Nuremberg tribunal, itself, had only the few implied references to universal jurisdiction quoted above, the jurisprudence of several of the subsequent war crimes trials based on the Nuremberg Charter and conducted under the international authority of Control Council Law No. 10 (“CCL 10”) are more explicit.²²⁵ A prominent example was *In re List*, which involved the prosecution of German officers who had commanded the execution of hundreds of thousands of

221. King, *supra* note 219, at 168 (the author was a prosecutor at Nuremberg).

222. Hans Kelsen, *The Legal Status of Germany According to the Declaration of Berlin*, 39 AM. J. INT’L L. 518, 524 (1945). Kelsen further explains: “By abolishing the last [g]overnment of Germany the victorious powers have destroyed the existence of Germany as a sovereign state. Since her unconditional surrender, at least since the abolishment of the Doenitz [g]overnment, Germany has ceased to exist as a state in the sense of international law.” *Id.* at 519.

223. “Thus it was a matter of pivotal importance during the [t]rial, as the two contending sides were aware, the Japanese civil power was not extinguished with the end of hostilities.” R. John Pritchard, *The International Military Tribunal for the Far East and its Contemporary Resonances: A General Preface to the Collection*, in THE TOKYO MAJOR WAR CRIMES TRIAL xxxi (J. Pritchard, ed., 1998). Pritchard further notes that “the Special Proclamation that brought the International Military Tribunal for the Far East into existence claimed that by the Instrument of Surrender ‘the authority of the Emperor and the Japanese Government to rule the state of Japan is made subject to the Supreme Commander for the Allied Powers.’” *Id.* at xxxi-ii.

224. *Id.* at xxxi (emphasis added).

225. On December 20, 1945, the Allied Control Council of Germany, composed of the Commanders-in-Chief of the occupying forces of each of the Four Powers, issued Control Council Law No. 10, which was intended to “establish a uniform legal basis in Germany for the prosecution of war criminals and other similar offenders, other than those dealt with by the International Military Tribunal.” See Matthew Lippman, *The Other Nuremberg: American Prosecutions of Nazi War Criminals in Occupied Germany*, 3 IND. INT’L & COMP. L. REV. 1, 8 (1992). CCL 10 and the Rules of Procedure for the CCL 10 proceedings are reproduced in 2 MORRIS & SCHARF, RWANDA TRIBUNAL, *supra* note 90, at 494, 497. By its terms, CCL 10 made the London Agreement and Nuremberg Charter an “integral part” of the law, and provided for the creation of tribunals established by the four occupying Powers in their zones of control in Germany to try the remaining German economic, political, military, legal, and medical leaders accused of war crimes and crimes against humanity. *Id.* CCL 10 arts. 1, 3. General Telford Taylor, the Chief Prosecutor of the U.S. CCL 10 trials, has written that the trials “were held under a comparable authorization from the same four powers that signed the London Charter.” TAYLOR, *supra* note 219, at 81.

civilians in Greece, Yugoslavia, and Albania.²²⁶ In describing the basis of its jurisdiction to punish such offenses, the U.S. CCL10 tribunal in Nuremberg indicated that the defendants had committed “international crimes” that were “universally recognized” under existing customary and treaty law.²²⁷ The tribunal explained that “[a]n international crime is . . . an act universally recognized as criminal, which is considered a grave matter of international concern and for some valid reason cannot be left within the exclusive jurisdiction of the [s]tate that would have control over it under ordinary circumstances.”²²⁸ The tribunal concluded that a state that captures the perpetrator of such crimes either may “surrender the alleged criminal to the [s]tate where the offense was committed, or . . . retain the alleged criminal for trial under its own legal processes.”²²⁹

Other decisions rendered by the CCL10 Tribunals that similarly rely on the universality principle include the *Hadamard Trial* of 1945,²³⁰ the *Zyklon B Case* of 1946,²³¹ and the *Einsatzgruppen Case* of 1948.²³² Based on these precedents, the United States Court of Appeals for the Sixth Circuit noted in *Demjanjuk v. Petrovsky* that “it is generally agreed that the establishment of these [World War

226. 11 *Trials of War Criminals* 757 (1946-1949) (U.S. Mil. Trib.—Nuremberg 1948). *In re List* is known as the Hostage Case because civilians were taken hostage and then killed.

227. *Id.* at 1235.

228. *Id.* at 1241.

229. *Id.* at 1242.

230. 1 *Law Reports of Trials of War Criminals* 46 (1949) (U.S. Mil. Commission—Wisbaden 1945). In asserting the universality principle as one of its bases of jurisdiction in a case involving allegations that the defendants had executed by lethal injection nearly 500 Polish and Russian civilians at a sanatorium in Hadamar, Germany, the United States Military Commission in the Hadamar Trial case claimed jurisdiction irrespective of the nationalities of the defendants and their victims and “of the place where the offence was committed, particularly where, for some reason, the criminal would otherwise go unpunished.” *Id.* at 53. The prosecution had argued that “[a]n offense against the laws of war is a violation of the law of nations and a matter of general interest and concern. . . . War crimes are now recognized as of special concern to the United Nations, which [s]tates in the real sense represent the civilized world.” Trial of Afons Klein, Adolf Wahlmann, Heinrich Ruoff, Karl Willig, Adolf Merkle, Irmgard Huber, and Philipp Blum 9 (The Hadamar Trial) (Earl W. Kintner ed., 1949) (reply by the prosecutor).

231. 1 *Law Reports of Trials of War Criminals* 93 (1949) (British Mil. Ct.—Hamburg 1946). In a case involving three German industrialists charged with having knowingly supplied poison gas used for the extermination of Allied nations (which did not include British victims), the British military court in Hamburg noted that jurisdictional support derived from the universality principle, under which every state has jurisdiction to punish war criminals. *See id.* at 103.

232. The *Einsatzgruppen Case* involved the trial before a U.S. Tribunal in Nuremberg of the commanders of killing squads that shadowed the German troops advancing into Poland and Russia. Citing the universality principle as one of the bases for the tribunal’s jurisdiction, the tribunal stated:

They are being tried because they are accused of having offended against society itself, and society, as represented by international law, has summoned them for explanation. . . . It is the essence of criminal justice that the offended community inquires into the offense involved. . . . There is no authority which denies any belligerent nation jurisdiction over individuals in its actual custody charged with violation of international law. And if a single nation may legally take jurisdiction in such instances, with what more reason may a number of nations agree, in the interest of justice, to try alleged violations of the international code of war?

United States v. Otto Ohlendorf, reprinted in IV TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10, at 411, 462 (1950).

II] tribunals and their proceedings were based on universal jurisdiction."²³³ These tribunals thus provide a compelling precedent for the collective exercise of universal jurisdiction.

E. The Precedent of the International Criminal Tribunals for the Former Yugoslavia and Rwanda

Like the Nuremberg tribunal, the International Criminal Tribunals for the former Yugoslavia ("ICTY") and Rwanda ("ICTR") represent a collective exercise of universal jurisdiction of States.²³⁴ In 1993 and 1994, the member states of the Security Council decided to establish the ICTY and ICTR by means of a binding decision of the Security Council. In doing so, they acted not as individual states on their own behalf, but rather as member states of the Security Council of the United Nations acting on behalf of the international community of States.²³⁵ Ambassador Scheffer and Professor Morris argue that the ICTY and ICTR are distinguishable from the ICC in their mode of creation.²³⁶ Professor Morris explains:

[A]s the ICTY/R are products of U.N. Security Council action under Chapter VII of the UN Charter, the tribunals' jurisdiction is more properly viewed as arising from the powers of the Security Council to take such steps as are required to restore or maintain international peace and security.²³⁷

Yet, upon closer examination, the foundations of the ICTY and ICTR are not as different from the ICC as Ambassador Scheffer and Professor Morris contend. While the tribunals were established pursuant to a Chapter VII Resolution of the Security Council (over the objections of Yugoslavia²³⁸ and Rwanda²³⁹), the underlying authority for the Council's action was a treaty—the U.N. Charter.²⁴⁰

233. *Demjanjak v. Petrovsky*, 776 F.2d 571, 582 (6th Cir. 1985) (referring to the IMT and CCL10 tribunals).

234. With respect to the defendant's argument concerning state sovereignty, the Tribunal's Appeals Chamber concluded that if any state could prosecute Tadic for his alleged war crimes and crimes against humanity under universal jurisdiction, it does not offend state sovereignty that an international tribunal could do so instead. See *Prosecutor v. Dusko Tadic*, International Tribunal for the Former Yugoslavia, IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction ¶ 58 (Appeals Chamber, Oct. 2, 1995); see also Geoffrey R. Watson, *The Humanitarian Law of the Yugoslavia War Crimes Tribunal: Jurisdiction in Prosecutor v. Tadic*, 36 VA. J. INT'L L. 687, 707 (1996).

235. See Yoram Dinstein, *The Universality Principle and War Crimes*, in MICHAEL SCHMITT & LESLIE GREEN, *THE LAW OF ARMED CONFLICT: INTO THE NEXT MILLENNIUM* 17-37 (1998); MORRIS & SCHARF, *AN INSIDER'S GUIDE*, *supra* note 66, at 87.

236. See Scheffer Address, *supra* note 11, at 4.

237. Morris, *High Crimes and Misconceptions*, *supra* note 13, at 35-36 (footnote omitted).

238. See Letter Dated 19 May 1993 from the Charge d'affaires, a.i., of the Permanent Mission of Yugoslavia to the United Nations Addressed to the Secretary-General, U.N. Doc. A/48/170-S/25801 [hereinafter *Charge d'affaires Letter*], reprinted in 2 MORRIS & SCHARF, *AN INSIDER'S GUIDE*, *supra* note 66, at 479-80.

239. See *Statement of Rwanda*, U.N. SCOR, 49th Sess., 3453 mtg. at 15-16, U.N. Doc. S/PV.3453 (1994), reprinted in 2 MORRIS & SCHARF, *RWANDA TRIBUNAL*, *supra* note 90, at 307-09.

240. The Yugoslavia tribunal applies to the Members of the U.N. Charter by virtue of Article 25, which provides, "The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter." Charter of the United Nations, June 26, 1945, 59 Stat. 1031, T.S. No. 993, 3 Bevans 1153, art. 25. The tribunal applies to states, such as Switzerland, which are not

It is true that, unlike the ICC, nearly every country on earth is a Party to the U.N. Charter; thus, the ICTY and ICTR exercise jurisdiction over nationals of most countries with their implied consent by virtue of their obligations as U.N. Members. Yet, the ICTY has recently indicted several officials²⁴¹ of one country, Serbia, that the United States and its NATO allies maintain is not a party to the U.N. Charter²⁴² by virtue of Security Council Resolution 777 and General Assembly Resolution 47/1. Those resolutions rejected the claim of the Federal Republic of Yugoslavia (Serbia and Montenegro) to be entitled to continue the membership of the Socialist Federal Republic of Yugoslavia in the United Nations.²⁴³ Thus, the ICTY provides modern precedent for a treaty-based international tribunal to issue indictments and arrest warrants for nationals of a

members of the United Nations, by virtue of Article 2(6) of the U.N. Charter, which provides, "The Organization shall ensure that states which are not [m]embers of the United Nations act in accordance with these [p]rinciples so far as may be necessary for the maintenance of international peace and security." *Id.* In accordance with Article 2(6), the International Court of Justice in its advisory opinion in the *Namibia Case*, declared that the non-member states of the U.N. must "act in accordance with" the decisions of the United Nations, which terminated the mandate for South-West Africa (Namibia) and declared the presence of South Africa in Namibia illegal. *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276, 1971 I.C.J. 16 (1960).*

241. On May 24, 1999, the Yugoslavia tribunal issued an indictment and arrest warrant for President Slobodan Milosevic and four other senior members of the government of the Federal Republic of Yugoslavia, charging them with war crimes and crimes against humanity in Kosovo. *See Prosecutor v. Slobodan Milosevic, Milan Milutinovic, Nikola Sainovic, Dragoljub Ojdanic, and Vlatko Stojiljkovic, Indictment issued May 22, 1999* <<http://www.un.org/icty/indictment>>.

242. In April 1999, the Federal Republic of Yugoslavia (Serbia and Montenegro) instituted proceedings before the ICJ against ten NATO countries, accusing them of bombing Yugoslav territory in violation of their obligation not to use force against another state. *See International Court of Justice, Press Communiqué 99/17, Apr. 29, 1999* <www.icj-cij.org>. Several of the respondents, including the United States and the United Kingdom, argued that the FRY was not a party to the United Nations by virtue of Security Council Resolution 777 (1992) and U.N. General Assembly Resolution 47/1 (1992), and therefore could not bring a case before the ICJ. The ICJ dismissed the FRY's request for provisional measures without addressing this issue. *See International Court of Justice, Press Communiqué 99/25, June 2, 1999* <<http://www.icj.law>>.

243. Security Council Resolution 777 (1992) provided:

Considering that the [s]tate formerly known as the Socialist Federal Republic of Yugoslavia has ceased to exist.

Recalling in particular resolution 757 (1992) which notes that the claim by the Federal Republic of Yugoslavia (Serbia and Montenegro) to continue automatically the membership of the former Socialist Federal Republic of Yugoslavia in the United Nations has not been generally accepted.

Considers that the Federal Republic of Yugoslavia (Serbia and Montenegro) cannot continue automatically the membership of the former Socialist Republic of Yugoslavia and recommends to the General Assembly that it decide that the Federal Republic of Yugoslavia (Serbia and Montenegro) should apply for membership in the United Nations and that it shall not participate in the work of the General Assembly.

S.C. Res. 777, U.N. SCOR, 47th Sess., 3116th mtg. at 1, U.N. Doc. S/RES/777 (1992). For a detailed history and analysis of Security Council Resolution 777 and General Assembly Resolution 47/1, see Michael P. Scharf, *Musical Chairs: The Dissolution of States and Membership in the United Nations*, 28 CORNELL INT'L L. J. 29-69 (1995). In the aftermath of the downfall of nationalist Serb leader Slobodan Milosevic, in October of 2000 the U.N. voted to admit the Federal Republic of Yugoslavia as a new member state. *See Steven Erlanger, Yugoslavia Now Wrestles with Forming a Government*, N.Y. TIMES, Nov. 5, 2000, at A13.

country that (the United States at the time asserted) was not a party to the treaty authorizing the creation of the tribunal.²⁴⁴

IV

THE TERRITORIALITY PRINCIPLE OF JURISDICTION

There is nothing novel under international law about a state exercising jurisdiction over the nationals of another state accused of committing an offense (whether or not of a universally condemned nature) in the territory of the former state without the consent of the latter. Thus, Americans expect foreigners to abide by U.S. law while in the United States and expect to be subject to foreign law when they travel abroad. The only difference here is that rather than prosecuting in domestic courts, the territorial state, through the Rome Treaty, has delegated its authority to prosecute to an international body.

Ambassador Scheffer has stated that the U.S. government does "not believe that the customary international law of territorial jurisdiction permits the delegation of territorial jurisdiction to an international court without the consent of the state of nationality of the defendant."²⁴⁵ This section examines three questions related to the territoriality principle. First, do the policies underlying the territorial principle of jurisdiction prevent its delegation to other states and international tribunals? Second, is there any precedent for the delegation of territorial jurisdiction to another state to prosecute an individual without the consent of the state of nationality of the accused? And Third, is there any precedent for the delegation of territorial jurisdiction to an international tribunal?

A. The Policies Underlying Territorial Jurisdiction

In the draft of Professor Morris's article that Ambassador Scheffer quoted from at the 1999 Annual Meeting of the American Society of International Law, Professor Morris suggested that delegation of territorial jurisdiction should not be seen as legitimate because it would undermine those features of territorial jurisdiction which warrant "its pride of place among internationally recognized bases for jurisdiction includ[ing] the presumed involvement of the interests of the state where the crime occurred and, secondarily, the convenience of the forum for the availability of witnesses and evidence and the like."²⁴⁶ There are several problems, however, with this contention, which are discussed below.

First, the United States has increasingly asserted territorial jurisdiction based on the "effects theory," especially with respect to narcotics cases in which the criminal acts occurred abroad so long as the drugs were intended to be distributed

244. While the FRY argues that Resolution 777 only excluded the FRY from participating in the General Assembly and not the rest of the U.N. system, the FRY nevertheless does not recognize the jurisdiction of the Yugoslav tribunal over FRY nationals. See *Charge d'affaires Letter*, *supra* note 238, reprinted in 2 MORRIS & SCHARF, AN INSIDER'S GUIDE, *supra* note 66, at 479.

245. See Scheffer Address, *supra* note 11, at 4.

246. Morris, *Exercise of ICC Jurisdiction*, *supra* note 13, at 11.

within the United States.²⁴⁷ In addition, under the legal fiction that a conspiracy takes place wherever a single co-conspirator commits an overt act, U.S. courts frequently exercise jurisdiction over co-conspirator acts committed abroad.²⁴⁸ In both of these types of cases, most of the witnesses and evidence are located abroad, thereby countering the argument about convenience of the forum meriting a doctrine of non-delegation of territorial jurisdiction.

Second, no internationally recognized jurisdictional hierarchy exists that would give greater weight to a country's assertion of the territorial basis of jurisdiction than other bases. This is demonstrated by U.S. extradition practice. When the United States receives two requests for extradition of a single fugitive from countries that each has a different basis of jurisdiction over the offense, the usual practice is to extradite to the country that lodged the request first, not to give priority to the territorial state.²⁴⁹ Similarly, the European Convention on Extradition provides that, when extradition is requested concurrently by more than one state for the same offense, the requested state shall make its decision "having regard to all the circumstances" including the respective dates of the requests, the nationality of the person, and the place of commission of the offense.²⁵⁰ The Convention does not indicate that territoriality should take precedence over the other factors.

For the United States and Great Britain, the territorial basis of jurisdiction was for years the primary type of jurisdiction exercised because the nations were separated from most of the rest of the world by great seas. These two countries began to become more aggressive in exercising other bases of jurisdiction in response to the relatively recent explosion of international commerce and tourism. For the Continental European countries, because of the close proximity of borders, the nationality basis of jurisdiction was always as important as the territoriality basis; and this has become even more the case as the European countries have adopted a system promoting the mobility and freedom of movement of the population.²⁵¹

Moreover, a state's interest in punishing war crimes or crimes against humanity that occur abroad can be every bit as significant as its interest in punishing crimes that are perpetrated within its own borders. This is especially

247. *Jordan Paust, et. al., International Criminal Law, Cases and Materials* 1270 (1996) (citing cases from the U.S. First, Second, Third, Fifth, and Ninth Circuit Courts of Appeals).

248. *See id.*

249. From 1989-91, the author served as Attorney-Adviser for Law Enforcement and Intelligence at the U.S. Department of State, with responsibility over extradition cases concerning European Countries.

250. European Convention on Extradition, Europ. T.S. No. 24, art. 17 (1957), *reprinted in* 2 M. CHERIF BASSIOUNI, *INTERNATIONAL CRIMINAL LAW, PROCEDURAL AND ENFORCEMENT* 313 (2d ed. 1999).

251. The Continental countries cite three important state interests served by the nationality principle. First, because a nation's nationals have the benefit and protection of their nationality while they are outside the state's borders, they should be answerable to the national jurisdiction for any offense they commit there. Second, any offense committed by a national abroad actually injures the country of nationality's reputation with respect to its neighbors. Third, if the country of nationality did not have the authority to assert jurisdiction, nationals who commit crimes abroad might escape prosecution. *See* Christopher L. Blakesley, *Extraterritorial Jurisdiction*, *in* 2 BASSIOUNI, *supra* note 250, at 63.

true in situations like Bosnia and Kosovo, where the NATO countries have committed troops to peace restoration operations whose success is in part dependent on the prosecution of indicted war criminals.²⁵²

Third, while the other bases of jurisdiction do not have the advantages of territoriality in terms of the location of witnesses and physical evidence, the international community has developed modes of judicial cooperation to hurdle that handicap.²⁵³ Thus, the European countries have adopted the European Convention on Mutual Assistance in Criminal Matters,²⁵⁴ and the United States has entered into two dozen bilateral Mutual Legal Assistance Treaties to facilitate obtaining evidence and witnesses from abroad.²⁵⁵ Similar types of judicial assistance would be employed for the ICC.²⁵⁶

Finally, potential for abuse may be reduced where the jurisdiction is transferred not to an individual state (Ambassador Scheffer cited the hypothetical case of France delegating jurisdiction to try an American to Libya²⁵⁷) but rather to a collective court. In such a case, the international court shares the interest of the party that triggered its jurisdiction as well as the interest of the international community in punishing grave international crimes. In contrast to the hypothetical case of larceny that Professor Morris cites,²⁵⁸ the perpetrators of the core crimes under the ICC's jurisdiction (war crimes, crimes against humanity, and genocide) are considered *hostis humani generis* (enemies of all humankind) and

252. For this reason, the United Nations High Representative for Bosnia has said, "As long as [the major indicted war criminals] are at large, there is not going to be a normal life in Bosnia, not only for rule of law reasons but also because of their influence in politics and economy in the country. . . . They have to go to The Hague." High Representative Carlos Westendorp, WASH. POST, Dec. 9, 1997, at A1. Calling for NATO to take action in particular to arrest Radovan Karadzic, Deputy High Representative Jacques Klein has stated, "Karadzic's presence still casts a cloud over what we do and it would be nice to have the political will to do what needs to be done because it poisons the atmosphere." Deputy High Representative Jacques Klein, REUTERS, Nov. 22, 1998. Canadian Foreign Minister Lloyd Axworthy was even more blunt in his assessment: "Without firm action on war crimes, reconciliation is doomed." Canadian Foreign Minister Lloyd Axworthy at the London Summit on Bosnia, WASH. POST, Dec. 5, 1996, at A39. And without reconciliation, the NATO force will either be forced to remain in Bosnia indefinitely, or war will break out as it withdraws. As a Senior NATO official acknowledged, "[u]nless Karadzic and other war criminals are captured before our peacekeepers go home, there is a good chance that the war could return and all our good efforts would be in vain." Senior NATO official, WASH. POST, June 13, 1997, at A36.

253. See Ekkehart Muller-Rappard, *Inter-State Cooperation in Penal Matters Within the Council of Europe Framework*, 2 BASSIOUNI, *supra* note 250, at 331; Allan Ellis & Robert L. Pisani, *The United States Treaties on Mutual Assistance in Criminal Matters*, in 2 BASSIOUNI, *INTERNATIONAL CRIMINAL LAW*, *supra* note 250, at 403.

254. European Convention on Mutual Assistance in Criminal Matters of 1959, Europ. T.S. No. 30 (1959), reproduced in 2 BASSIOUNI, *supra* note 250, at 381; Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters of 1978, Europ. T.S. No. 99 (1978), reproduced in 2 BASSIOUNI, *INTERNATIONAL CRIMINAL LAW*, *supra* note 250, at 389.

255. The United States has entered into Mutual Legal Assistance Treaties with Argentina, Austria, the Bahamas, Belgium, Canada, the Cayman Islands, Colombia, Hungary, Italy, Jamaica, Mexico, Morocco, the Netherlands, Nigeria, Panama, the Philippines, Poland, Spain, South Korea, Thailand, Turkey, the United Kingdom, and Uruguay. See Ellis & Pisani, *supra* note 253, in 2 BASSIOUNI, *supra* note 250, at 406-07.

256. See Rome Treaty, *supra* note 4, arts. 86-102, reprinted in BASSIOUNI, *THE STATUTE OF THE INTERNATIONAL CRIMINAL COURT*, *supra* note 4, at 39.

257. See Morris, *High Crimes and Misconceptions*, *supra* note 13, at 46 (presenting the hypothetical).

258. See *id.* at 65.

the crimes themselves (even when committed in an internal conflict) are considered a threat to international peace and security.²⁵⁹ Thus, there are no special features of territorial jurisdiction that would as a matter of policy preclude the delegation of territorial jurisdiction to an international criminal court.

B. The Relevance of the Transfer of Proceedings Convention

Although Ambassador Scheffer and Professor Morris acknowledge the precedent of the 1972 European Convention on the Transfer of Proceedings in Criminal Matter, they imply that the Convention permits transfer of proceedings only with the consent of the state of nationality, and conclude that “there seem to be no precedents for delegating territorial jurisdiction to another state when the defendant is a national of a third state in the absence of consent by that state of nationality.”²⁶⁰ However, a close examination of the text of the European Convention,²⁶¹ its legislative history, and the writings of experts on its application reveal that the Convention does in fact permit transfer of proceedings in the absence of the consent of the state of nationality, and therefore provides the very precedent that Ambassador Scheffer and Professor Morris assert is missing.

259. See S.C. Res. 955, U.N. SCOR, 49th Sess., at 20, U.N. Doc. S/INF50 (1996) (determining that the “genocide and other systematic, widespread and flagrant violations of international humanitarian law” committed in Rwanda “constitute a threat to international peace and security”). In the explanations of their vote on the establishment of the Rwanda tribunal, the members of the U.N. Security Council made clear that serious war crimes, crimes against humanity, and genocide, by their nature, affect the entire international community, even when committed in an internal conflict. See Statement of France, U.N. SCOR, 49th Sess., 3453rd mtg. at 3, U.N. Doc. S/PV 3453 (1994) (“Because of their particular seriousness, the offenses which fall within the competence of the tribunal are a threat to peace and international security.”); Statement of the Czech Republic, U.N. SCOR, 49th Sess., 3453rd mtg. at 6-7, U.N. Doc. S/PV 3453 (1994) (“Even though the conflict in Rwanda was a domestic one its consequences affected the entire international community, inasmuch as fundamental principles of international humanitarian law were violated.”); Statement of the United Kingdom, U.N. SCOR, 49th Sess., 3453rd mtg. at 6, U.N. Doc. S/PV 3453 (1994) (“The gravity of the human rights violations committed in Rwanda extended far beyond that country—they concerned the international community as a whole.”); Statement of China, U.N. SCOR, 49th Sess., 3453rd mtg. at 6, U.N. Doc. S/PV 3453 (1994) (“It is not only the Rwandese people that are affected by such grave violations of human rights and the fundamental values of mankind, but the entire international community.”); Statement of Pakistan, U.N. SCOR, 49th Sess., 3453rd mtg. at 10, U.N. Doc. S/PV 3453 (1994) (“The Security Council has just adopted another landmark resolution clearly establishing that gross and systematic violations of international humanitarian law constitute a threat to international peace and security.”).

260. Scheffer Address, *supra* note 11, at 4 (“As Professor Morris notes, there seem to be no precedents for delegating territorial jurisdiction to another state when the defendant is a national of a third state in the absence of consent by that [sic] state of nationality.”).

261. The European Convention on the Transfer of Proceedings in Criminal Matter, Europ. T.S. No. 73, is reproduced in 2 BASSIOUNI, *supra* note 250, at 661. The Convention has been ratified by Austria, Czech Republic, Denmark, Netherlands, Norway, Slovakia, Spain, Sweden, Turkey, and the Ukraine, and signed (but not yet ratified) by Belgium, Greece, Iceland, Liechtenstein, Luxembourg, and Portugal.

The U.N. has also prepared a Model Treaty dealing with the transfer of proceedings in criminal matters, based on the text of the European Convention. Like the European Convention, the Model Treaty does not require the consent of the state of nationality of the accused as a prerequisite in all cases for the transfer of proceedings. See DAVID MCCLEAN, INTERNATIONAL JUDICIAL ASSISTANCE 169-71 (1992).

According to a 1990 study prepared by the Council of Europe's Select Committee of Experts on Extraterritorial Jurisdiction,²⁶² the 1972 European Convention on the Transfer of Proceedings in Criminal Matters embodies the "representation" principle:²⁶³

This term refers to cases in which a state may exercise extraterritorial jurisdiction where it is deemed to be acting for another state which is more directly involved, provided certain conditions are met. In general, these are a request from another state to take over criminal proceedings, or either the refusal of an extradition request from another state and its willingness to prosecute or confirmation from another state that it will not request extradition. . . . Member states party to the convention have adopted the principle in their national legislation in order to implement the convention.²⁶⁴

The "representation principle" of the European Convention operates in the reverse of extradition. The Convention is usually employed in cases in which an accused offender has fled the state in whose territory the offense was committed and is present in the requested state, which, pursuant to the authority of the Convention, is willing to prosecute the offender upon the request of the territorial state.²⁶⁵ Instead of requesting the fugitive for trial in the state in which an offense occurred, the territorial state "deputizes" the custodial state with its authority to prosecute the offender.²⁶⁶

According to the legislative history of the Convention, "usually—but not always," the offender is a national of the requested state,²⁶⁷ in which case transfer takes place with the consent of the state of nationality. There have, in fact, been cases in which the transferred person is a national of a third state, whose consent is not requested because it is not relevant under the Convention.²⁶⁸ The Convention is intended to apply, for example, where the offender is a national of a third state who is a resident alien of the requested state, or is present in the requested state due to criminal proceedings against him on an unrelated offense committed in the requested state.²⁶⁹ In such cases, the Convention does not require the consent of

262. The committee, which was chaired by Julian Schutte, was composed of experts from 13 member States of the Council of Europe (Austria, Belgium, Denmark, France, Federal Republic of Germany, Italy, Luxembourg, Netherlands, Norway, Portugal, Spain, Switzerland, and the United Kingdom).

263. Council of Europe, *Extraterritorial Criminal Jurisdiction*, reprinted in 3 CRIM. L. F. 441, 452 (1992).

264. *Id.* at 452.

265. See Julian Schutte, *The European System*, in 2 BASSIOUNI, *supra* note 250, at 661.

266. *Id.* at 648. Under the Convention, the requesting state's jurisdiction is "transferred" to the requested state in that the Convention prohibits the requesting state from subsequently prosecuting the suspect for the offense in question. *Id.* at 650.

267. Council of Europe, *Explanatory Report on the European Convention on the Transfer of Proceedings in Criminal Matters* 20 (Strasbourg, 1985).

268. According to Professor Andre Klip of the University of Utrecht, who was one of the drafters of the Council of Europe's *Explanatory Report on the European Convention*, *id.*, no statistics have been compiled on the number of times the Convention has been used to transfer a national of a third state, but "such cases [in which the consent of the states of nationality was not requested or given] are not unheard of." Interview with Andre Klip, Siracusa Sicily, Sept. 15, 1999.

269. See Council of Europe, *Explanatory Report*, *supra* note 267, at 32; see also Schutte, *supra* note 265, in 2 BASSIOUNI, *supra* note 250, at 648; see also DAVID MCCLEAN, *INTERNATIONAL JUDICIAL ASSISTANCE* 146-49 (1992).

the state of the offender's nationality as a prerequisite for the transfer of proceedings to the requested state.²⁷⁰

C. Nuremberg and the Territoriality Principle

As demonstrated above,²⁷¹ one of the bases for the Nuremberg Tribunal's jurisdiction was the universality principle, collectively exercised on behalf of the Allied Nations. An overlapping basis for the Nuremberg tribunal's jurisdiction was the territoriality principle, in that the tribunal was established by occupying powers who had assumed the sovereign functions of the State of Germany. Thus, Professor Roger Clark writes, "[t]he power of the Allies to set up the Tribunal may be said to flow either from their authority as the *de facto* territorial rulers of a defeated Germany, or more congenially, as exercising the authority of the international community operating on a type of universal jurisdiction."²⁷² Professor Schwelb similarly concluded:

If the Tribunal based the legislative powers of the signatories of the Charter on the unconditional surrender of Germany and the right to legislate for occupied territory, it did not exclude the construction that the Nuremberg proceedings had, in addition to this territorial basis, also a wider foundation in the provisions of international law and the Court the standing of an international judicial body.²⁷³

The territorial authority of the Occupying Powers was described in 1945 by Professor Hans Kelsen in the following terms:

The unconditional surrender signed [on June 5, 1945] by the representatives of the last legitimate Government of Germany may be interpreted as a transfer of Germany's sovereignty to the victorious powers signatories to the surrender treaty. . . . Since the German territory together with its population has been placed under the sovereignty of the occupant states, the whole legislative and executive power formally exercised by the German Government has been taken over without any restriction by the governments of the occupant states.²⁷⁴

In the *Einsatzgruppen Trial*, the CCL 10 tribunal indicated that its jurisdiction (and that of the Nuremberg tribunal) was based on a mixture of the universality principle and the territoriality principle:

In spite of all that has been said in this and other cases, no one would be so bold as to suggest that what occurred between Germany and Russia from June 1941 to May 1945 was anything but war, and, being war, that Russia would not have the right to try the alleged violators of the rules of war on her territory and against her people. And if

270. The European Convention on the Transfer of Proceedings in Criminal Matter, art. 8, Europ. T.S. No. 73, reproduced in 2 BASSIOUNI, *supra* note 250, at 661. While the requested state may approve the transfer of proceedings in the absence of the consent of the state of the offender's nationality, it has discretion to decline the request unless the accused is a national of the requested state or is a national of a third state who is ordinarily resident in the requested state. See *id.* art. 11.

271. See *supra* notes 211-233 and accompanying text.

272. Roger Clark, *Nuremberg and Tokyo in Contemporary Perspective*, in THE LAW OF WAR CRIMES, NATIONAL AND INTERNATIONAL APPROACHES 172 (Timothy L. H. McCormack & Gerry J. Simpson, eds. 1997).

273. Schwelb, *supra* note 213, at 210.

274. Kelsen, *supra* note 222, at 518-19, 520.

Russia may do this alone, certainly she may concur with other nations who affirm that right.²⁷⁵

As previously discussed,²⁷⁶ at the time of the unconditional surrender of the German army, there existed no sovereign German state to provide consent for the trial of the major German war criminals at Nuremberg. Nor could the German people be deemed to be nationals of the occupying powers.²⁷⁷ Therefore, the creation of the tribunal by the occupying powers did not amount to the consent of the state of nationality of the accused. Consequently, in addition to universal jurisdiction, the Nuremberg and CCL 10 tribunals exercised the delegated territorial jurisdiction of its members without the consent of the state of the accused's nationality—providing a strong historic foundation for the ICC's jurisdictional reach.

V

CONCLUSION

The analysis of the historic precedent and principles of international law contained in this article has shown the ICC's jurisdiction over the nationals of non-party states to be well-grounded in international law. The exercise of such jurisdiction can be based both on the universality principle and the territoriality principle.

The core crimes within the ICC's jurisdiction—genocide, crimes against humanity, and war crimes—are crimes of universal jurisdiction. The negotiating record of the Rome Treaty indicates that the consent regime was layered upon the ICC's universal jurisdiction over these crimes, such that with the consent of the state in whose territory the offense was committed, the court has the authority to issue indictments over the nationals of non-party states. The Nuremberg tribunal and the ad hoc tribunal for the former Yugoslavia provide precedent for the collective delegation of universal jurisdiction to an international criminal court without the consent of the state of the nationality of the accused.

In addition, international law recognizes the authority of the state where a crime occurs to delegate its territorial-based jurisdiction to a third state or international tribunal. Careful analysis of the European Convention on the Transfer of Proceedings indicates that the consent of the state of the nationality of the accused is not a prerequisite for the delegation of territorial jurisdiction under the Convention. There are no compelling policy reasons why territorial

275. *United States v. Otto Ohlendorf*, reprinted in *IV TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10*, at 411, 462 (1950).

276. See *supra* notes 221-222 and accompanying text.

277. As Professor Kelsen explained,

[s]ince the occupant state does not intend to annex the occupied territory placed under its sovereignty, it will not confer upon the former citizens of the occupied state political rights with respect to its own legislative or executive organs, nor will the occupant state impose upon them military duties. Consequently they are not to be considered as "citizens" of the occupant state.

Kelsen, *supra* note 222, at 523.

jurisdiction cannot be delegated to an international court and the Nuremberg Tribunal provides the precedent for the collective exercise of territorial as well as universal jurisdiction.

In the final analysis, there is scant basis for convincing the parties to the Rome Treaty that they must refrain from exercising the universal and territorial jurisdiction of the ICC over the nationals of non-party states as a matter of international law. Since the ICC can legitimately indict U.S. officials for crimes committed in the territories of state parties to the Rome Treaty, the United States actually preserves very little by remaining outside the treaty regime—and could protect itself better by signing the treaty.

In its refusal to recognize this reality, the Executive Branch has resorted to a legal interpretation that is not only based on selective use of the historic record and incomplete analysis of the guiding precedents, but also has the potential of undermining important U.S. law enforcement interests. Unless the Executive Branch abandons (or significantly modifies) its controversial legal argument, Ambassador Scheffer's sweeping statement that a treaty cannot legitimately provide the basis for jurisdiction with respect to nationals of non-party states will almost certainly be cited by accused terrorists, torturers, war criminals, and drug traffickers to block future U.S. efforts to exercise treaty-based jurisdiction over such persons who are nationals of non-party states.²⁷⁸

278. Perhaps signaling belated recognition of the magnitude of this problem, during the ICC PrepCom Sessions in the summer and fall of 1999, and in its statement to the U.N. General Assembly in October 1999, the U.S. Delegation did not repeat its controversial legal contention and instead made the case against the exercise of jurisdiction over the officials and personnel of non-state parties on purely practical terms. See *U.S. Statement Before the U.N. General Assembly Sixth Committee, The Rome Treaty on the International Criminal Court*, Oct. 21, 1999 (on file with author) ("The Court's inadequate jurisdictional safeguards—especially as applied to nationals of States that have not joined the Treaty—risk inhibiting responsible international military efforts in support of humanitarian or peacekeeping objections and, for this reason, the U.S. cannot sign the Treaty."). Then, at the March 2000 PrepCom, the United States circulated a proposed text for the ICC-U.N. Relationship Agreement, which would provide:

The United Nations and the International Criminal Court agree that the Court may seek the surrender or accept custody of a national who acts within the overall direction of a U.N. Member State, and such directing State has so acknowledged, only in the event (a) the directing State is a State Party to the Statute or the Court obtains the consent of the directing State, or (b) measures have been authorized pursuant to Chapter VII of the U.N. Charter against the directing State in relation to the situation or actions giving rise to the alleged crime or crimes, provided that in connection with such authorization the Security Council has determined that this subsection shall apply.

Proposed text on file with author. If this proposal were adopted, it would permit the ICC to exercise adjudicatory jurisdiction (i.e., issue indictments) with respect to the nationals (including officials) of non-party states—the very thing the United States has argued is a violation of international law. The proposal would, however, preclude the surrender of such persons to the ICC where the state has acknowledged that the accused acted within its "overall direction."